Public Utilities

FORTNIGHTLY

January 31, 1946

PUBLIC UTILITIES REPORTS, INC.
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Public Utilities Fortnightly

VOLUME XXXVII *January 31, 1946* NUMBER 3

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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Pages with the Editors

WE are pleased to present to our readers for the first time a contribution from the administrator of the Rural Electrification Administration. Strictly speaking, that sentence is not exactly correct, because we were privileged some years ago to present articles on two different occasions by a former REA Administrator, the predecessor in office of our present contributor. But this is the first time that CLAUDE R. WICKARD, who after all has only been REA Administrator for six months, has appeared in the pages of the FORTNIGHTLY, so we welcome him and we know that what he has to say about REA and its work will be followed with interest by all of our readers.

CLAUDE R. WICKARD was born on a farm in Carroll county, Indiana, in 1893, and his background has been such that he is obviously qualified to speak and write with authority about the American farm and its problems. For nearly a quarter of a century he has been an active and successful farmer, beginning while attending Purdue University, from which he graduated with a BSA (Bachelor of Science in Agriculture). In 1927 the *Prairie Farmer*, Midwest farm magazine, named him the master farmer of Indiana in recognition of his progressive and scientific farming methods.

CLAUDE R. WICKARD

The proof of the REA pudding is in the eating; farmers can't get enough.

(SEE PAGE 149)

HE joined the U. S. Agriculture Adjustment Administration in 1932 after a short period of service in the Indiana senate, and won such attention in government agricultural work that he was appointed Secretary of Agriculture in September, 1940. He took his present position as REA Administrator in July, 1945, upon appointment by President Truman.

DANA B. VAN DUSEN

Beware of "nonprofit" Greeks bearing "gifts" to American municipalities.

(SEE PAGE 135)

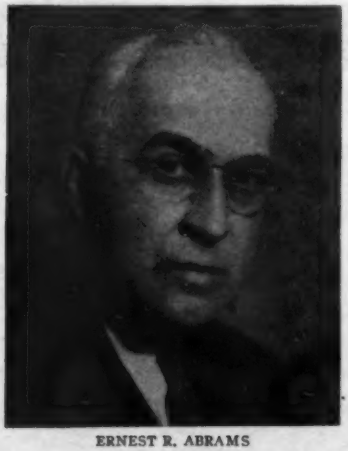
THERE is an old maxim to the effect that you should never look a gift horse in the mouth. That is probably good advice about a horse. But suppose somebody were to give you a tiger or an alligator. In that case you would do well to look the gift in the mouth very carefully before accepting it, and make sure you are not too near while doing so. Which prompts the further observation that although it may be more blessed to give than to receive, it is not much fun receiving either, if the "gift" turns out to be a liability instead of an asset.

THESE general comments are prompted by what we trust will be the timely presentation, beginning in this issue, of a 3-part series of articles on the subject of the possible use of the so-called "nonprofit corporation" as a subterfuge for promoting public acquisition of utility properties. In other words, it is conceivable that a number of cities or other public subdivisions may find themselves confronted with "gifts" which may devour them financially, if these public agencies are to be placed entirely at the mercy of sincere and well-meaning donors.

OF course, the words "gift" and "donors" are not entirely analogous with the situation outlined in this 3-part series. "Beneficiary," and "trustee" would be more exact terms. But the general idea is the same. A group of public-spirited citizens get together and decide what their fair city really needs, but what the city fathers are either too lazy or stupid to figure out for themselves. Having made this decision, our public-spirited little group proceeds to make a down payment, pledging the city's reputation, if not its tax credit, to pay the balance and turn over the whole proposition—signed, sealed, and delivered—to the city for further and full performance of a complete and complicated obligation which they have made in its behalf. The aftermath of Christmas shopping is still too clear and painful to so many family fathers to warrant any more than the mere observation that something like that very often happens to dear old dad when he receives "gifts" from his beloved family.

DANA B. VAN DUSEN, author of this 3-part series on the use and abuse of the nonprofit corporation, with relation to public ownership, is presently the general counsel and vice general manager of the Metropolitan Utilities District of Omaha, which operates publicly owned water, gas, and ice plants. He is also a member of the committee on municipally owned utilities of the National Institute of Municipal Law Officers. The author's education and professional background have thus fitted him preëminently to deal with this fairly new politico-legalistic phenomenon. Born in Omaha in 1891, he was educated at the University of Nebraska and Harvard Law School, being admitted to the Nebraska bar in 1915. He began legal practice with the Union Pacific Railroad for one short year and never since that date has represented any privately owned utility. After five years of general practice in Omaha, he became city attorney in 1921 and corporation counsel of that community in 1926. In 1929 he joined his present organization.

MR. VAN DUSEN has appeared in dozens of important cases, mostly on behalf of the city of Omaha, and many terminating in the U. S. Supreme Court. Probably the most notable was in 1942, when he successfully persuaded the National War Labor Board that it had no jurisdiction to enforce collective bargaining between a municipally owned and operated utility district and its employees. MR. VAN DUSEN'S brief concerning collective bargaining rights, or lack of them, of municipal utility employees was regarded in the profession as a classic of its kind, reprinted and widely distributed. He was also active in the well-known case of Platte Valley Public Power District *v.* County of Lincoln, 144 Neb 584 (1944), which resulted in sustaining the tax-exempt status of publicly owned plants.



ERNEST R. ABRAMS

One of the nation's earliest ventures in private enterprise has gone into municipal ownership.

(SEE PAGE 158)

ERNEST R. ABRAMS, whose article on Alexander Hamilton's early utility venture begins on page 158, is a business writer and editor now living in New York city, whose articles frequently appear in this magazine.

AMONG the important decisions preprinted from *Public Utilities Reports* in the back of this number, may be found the following:

THE Securities and Exchange Commission, in passing upon a plan for retirement of debentures under § 11(e) of the Holding Company Act, rules that the bondholders are not entitled to a premium, as such, upon such a retirement, and that not all debt prepayments pursuant to such plan need be at the face amount of the debt claim, regardless of contract rights or of risks relating to the particular debentures. (See page 129.)

THE next number of this magazine will be out February 14th.

The Editors

In This Issue

In Feature Articles

In Financial News

In What Others Think

In The March of Events

In the Latest Utility Rulings

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 129-192, from 61 PUR(NS)

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

WENDELL BERGE
Assistant Attorney General.

"Inequities in transportation costs have held the West down almost to the status of an economic colony."

LEO WOLMAN
Director, National Bureau of Economic Research.

"When the government fixes wages, it fixes costs and prices and profit at the same time, although it may not admit that is what it is doing."

BEARDSLEY RUML
Economist.

"I have heard people say that The Bomb bores them. I feel certain that it is not The Bomb that bores them, but what is said about The Bomb."

GILL ROBB WILSON
Columnist, New York Herald Tribune.

". . . the trouble with most minority leaders in the United States today is that they too recently came from backgrounds of other histories where anyone who complained about anything usually was right. The United States is young enough as a nation to know that incentive rather than subsidy is the muscle of enterprise."

EDITORIAL STATEMENT
The New York Times.

"What the Federal government has to decide now, through Congress and the administration, is whether it should withdraw from the one-sided labor intervention of recent years, or whether it should attempt to balance out this intervention with a two-sided policy that recognizes union responsibilities as well as union rights."

HERBERT HOOVER
Former President of the United States.

"The redemption of mankind will depend upon those who can give intellectual, moral, and spiritual leadership in these immediate years. And by leadership I do not speak of public life alone. We must have leadership in every branch of life from the shop foreman to the President. We must have leadership among the neighbors and in the home."

HARRY A. BULLIS
President, General Mills, Inc.

"What are the aims and needs of the country? What are the policies that industry should adopt and follow? What does America want? If industry will speak out on these and similar questions, and keep on speaking, we will in time arrive at an agenda for the future which will help to bring us that unity which our nation so sorely needs during this critical period of transition from war to peace."

CHESTER BOWLES
Administrator, Office of Price Administration.

"Prices that depend upon sweat-shop wages are sweat-shop prices. No thoughtful consumer would choose to benefit through lower prices if those prices are based on substantial wages."

ELLWOOD J. TURNER
Chairman, water resources committee, Council of State Governments.

"If the people of a river watershed want a TVA type of agency, they should be privileged to have it, provided such an agency is created in accordance with constitutional procedures and at the express request of the people of the region affected."

L. R. CLAUSEN
President, J. I. Case Company.

"All we need is a restoration of law and order in this country and the insistence by our people upon our public servants carrying out their oaths of office and the law. When this condition of Americanism is restored 90 per cent of our industrial difficulties will pass away."

LEWIS SCHWELLENBACH
Secretary of Labor.

"Only the establishment of uniform national standards against wage discrimination can afford adequate protection to the standards established by individual states. I see no basis for making a distinction between men and women workers in this connection. If they turn out the same quantity and quality of work, they should receive the same compensation."

HOMER D. ANGELL
U. S. Representative from Oregon.

"The big problem facing us here in America is to provide jobs in private enterprise for the GI's returning to civilian life and for the workers released from war industries. Unless we are going to adopt a socialistic program and resort again to WPA spending, opportunity must be given to private capital to be put to work without seizing all profits resulting therefrom in order to provide full employment with American standards of wages."

JOHN W. SNYDER
Director, War Mobilization and Reconversion.

"We must boost our production and expand our distribution of peacetime goods as rapidly as possible. We must, until such time as supply begins to catch up with demand, hold the line against runaway inflation. We must maintain the income—the buying power—of our people at high levels. We must fight this threat of inflation as we would the plague. The first and best way to fight it is to produce more goods. There is reason for optimism on this score."

JOHN M. HANCOCK
Partner, Lehman Brothers, and co-author, Baruch-Hancock report.

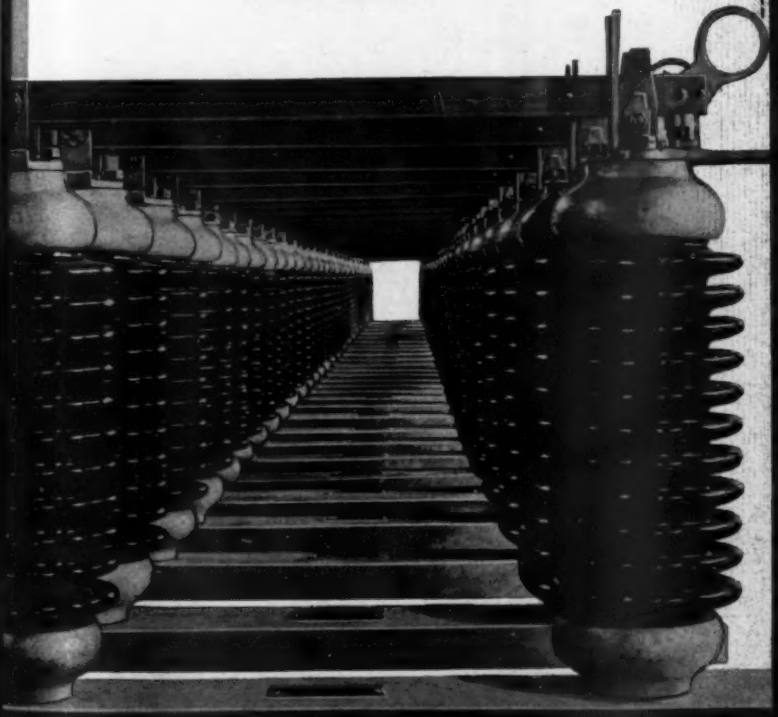
"Unhappily, state socialism lends itself as a great political tool for the demagogue who can gain votes by promising the benefits of state socialism, when he isn't going to be held to account for the long-range effects of his promises. Promises of immediate benefits will always be more powerful than distant dangers and far-removed risks. The man who does not have to count the costs of carrying out these promises can marshal a political force which will always be difficult to overcome."

R&IE

the Switching Equipment SPECIALIST

For over thirty years R&IE has concentrated on the business of switchgear manufacturing. The introduction of R&IE Hi-Pressure Contacts to switching equipment has been the most revolutionary and most imitated of the major switch developments. R&IE is continually searching for refinements, improvements and other operating advantages.

Here is shown a production line of type HPS, hook operated disconnecting switches.



Type **HPS DISCONNECTING SWITCHES** have button-type Hi-Pressure spot jaw contacts and ring-type Hi-Pressure hinge contacts.

AILWAY AND INDUSTRIAL ENGINEERING COMPANY

KENSBURG, PA. . . . . In Canada — EASTERN POWER DEVICES, LTD., TORONTO

The CHECK LIST

CONDUCTOR SUPPORT CLAMPS AND FITTIN

DISCONNECTING SWITCH INDOOR AND OUTDOOR

HORN GAP SWITCH

INTERRUPTER SWITCH

CUTOUTS AND THERMO-RUPTERS

SWITCH OPERATIN MECHANISMS

SUBSTATIONS

OPEN OR ENCLOSED ISOLATED PHASE HEAVY DUTY BUSE

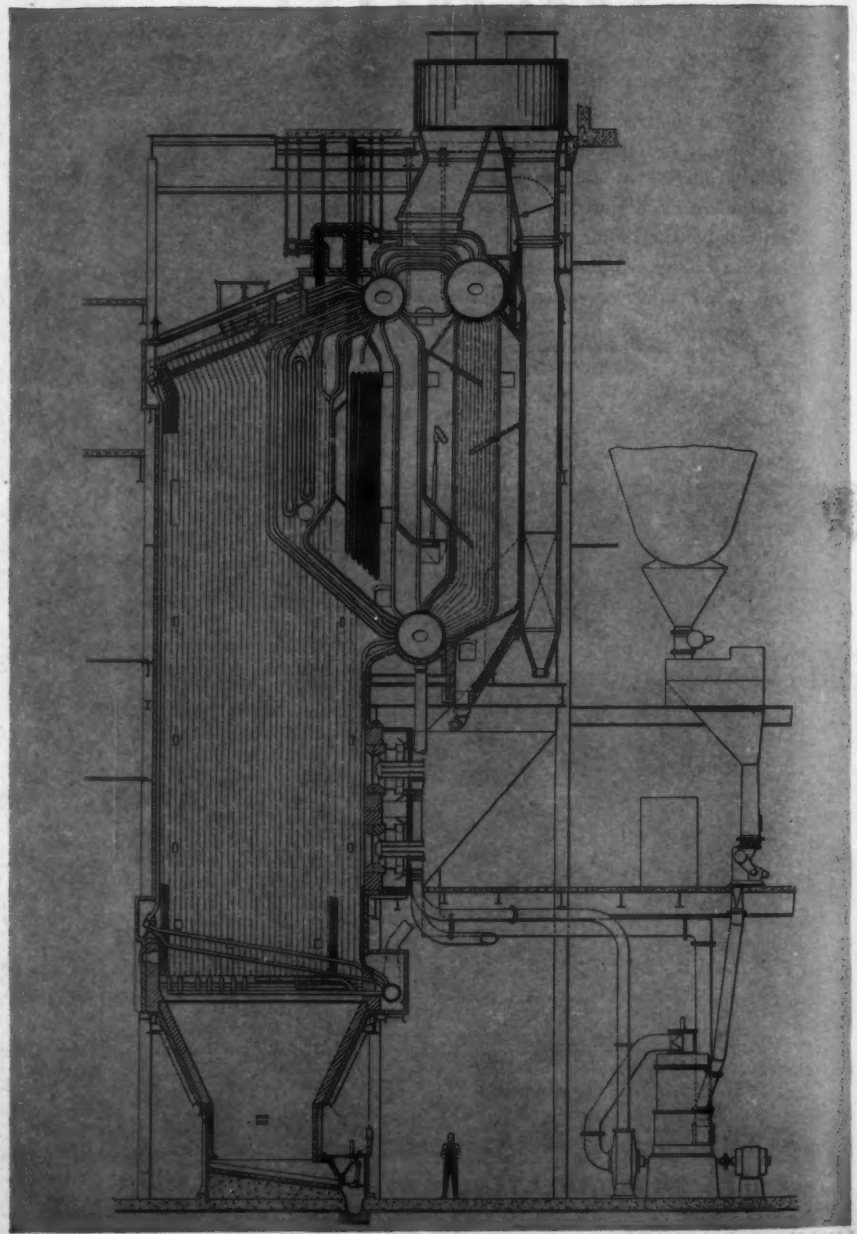
KIRK INTERLOCK SYSTEMS

AUTOMATIC EQUIPMENT

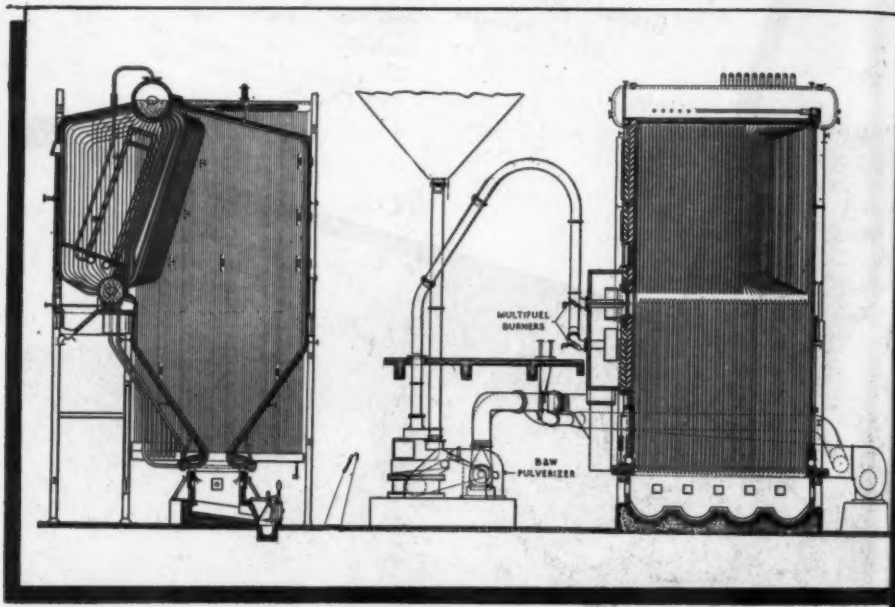
METAL CUBICLES

TESTING DEVICE

DEVON STEAM STATION

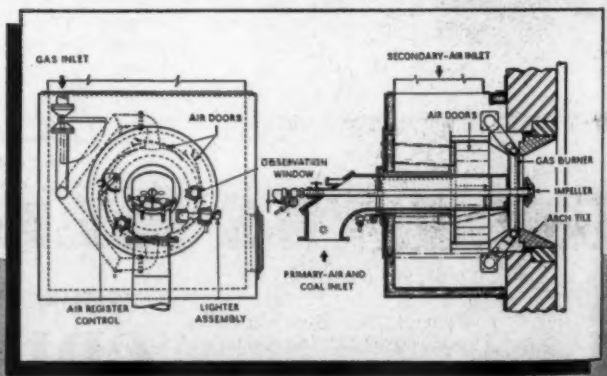


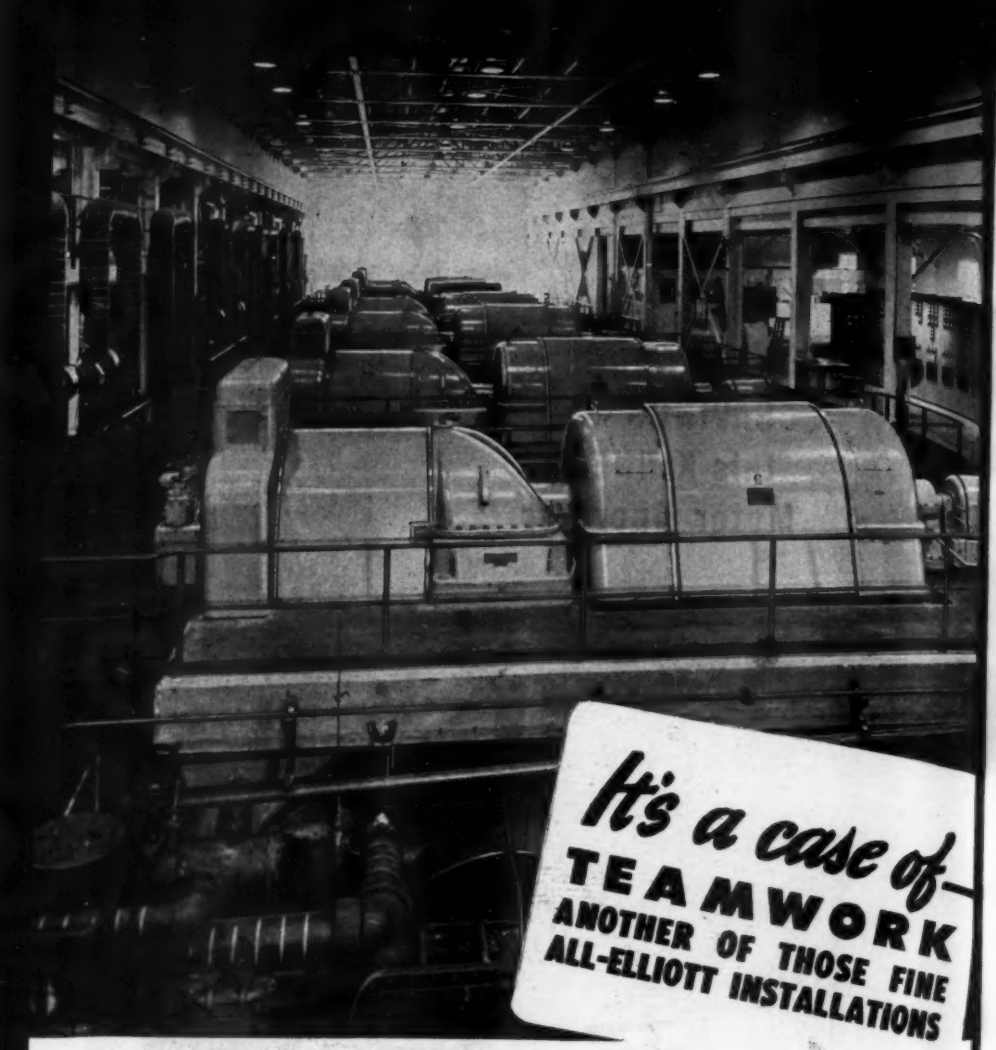
Use All Three



Above—Typical B&W Integral-Furnace Boiler arranged for Multi-Fuel Firing.

Right—Details of B&W Multi-Fuel Burner.





Vital wartime power needs were supplied by this line of rugged, smooth-operating Elliott turbine-generator units, each served by its Elliott surface condenser.

In an installation like this, highest operating results can be taken for granted. It's a case of team-work. The Elliott units are actually designed together, built togther, and when installed each clicks into its proper place without modification or compromise. Plants like these are a source of pride to their builders, and of gratification to their operators.

H-6938

ELLIOTT COMPANY

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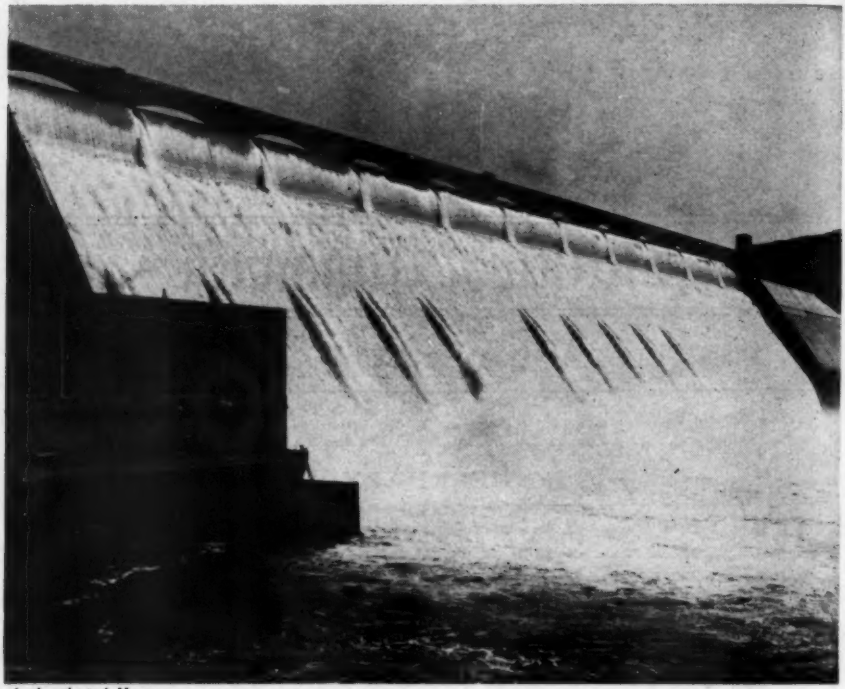
Utilities Almanack

January

31	Th	¶ *Illuminating Engineering Society regional conference begins, Philadelphia, Pa., 1946.* ¶ *Home Service Work Shop begins, Kansas City, Mo., 1946.*

February

1	F	¶ *Pennsylvania Gas Association midwinter sales conference will convene, 1946.*
2	Sa	¶ *Edison Electric Institute, Transmission and Distribution Committee, will hold meeting, Cincinnati, Ohio, Feb. 18, 19, 1946.*
3	S	¶ *Edison Electric Institute, Electrical Committee, will convene, Cincinnati, Ohio, Feb. 20, 21, 1946.*
4	M	¶ *National Metal Exposition begins, Cleveland, Ohio, 1946.*
5	Tu	¶ *National Rural Electric Coöperative Association will hold annual meeting, Buffalo, N. Y., Mar. 4-6, 1946.*
6	W	¶ *Industrial Gas Breakfast, Cleveland, Ohio, 1946.*
7	Th	¶ *Pennsylvania Electric Association, Transmission and Distribution Committee, meeting begins, Philadelphia, Pa., 1946.*
8	F	¶ *Southern Gas Association will hold annual meeting, Galveston, Tex., Mar. 21, 22, 1946.*
9	Sa	¶ *New England Gas Association will hold annual business conference, Boston, Mass., Mar. 21, 22, 1946.*
10	S	¶ *American Gas Association Conference on Industrial and Commercial Gas convenes, Toledo, Ohio, Mar. 28, 29, 1946.*
11	M	¶ *FPC resumes natural gas investigation hearings, Biloxi, Miss., 1946.* ¶ *Canadian Electrical Association winter conference begins, Quebec City, Canada, 1946.*
12	Tu	¶ *Kentucky Independent Telephone Association will hold meeting, Apr. 4, 5, 1946.*
13	W	¶ *Missouri Valley Electric Association power sales conference begins, Kansas City, Mo., 1946.*



Authenticated News

A Man-made World Wonder

The above is a view of the Grand Coulee dam taken from the banks of the Columbia river above the tailrace of the east powerhouse building. The spillway section, 1,650 feet across, is shown discharging approximately 90,000 cubic feet of water per second.

Public Utilities
FORTNIGHTLY

VOL. XXXVII, No. 3 JANUARY 31, 1946

The Nonprofit Subterfuge for Acquiring Public Utilities

Part I. *Is the nonprofit corporation an instrumentality of the states?*

The sudden and widespread proposal to use the so-called nonprofit corporation as a means for facilitating acquisition for eventual public ownership of utility properties "orphaned" by the Holding Company Act has prompted this timely examination and criticism of such fairly novel procedure by an eminent legal specialist in this field.

By DANA B. VAN DUSEN
GENERAL COUNSEL, METROPOLITAN UTILITIES DISTRICT OF OMAHA; MEMBER, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

BACK in the late nineties a group of citizens professing a strong spirit of public service, and apparently being outraged by the actions of the city council of the city of Chicago in the days of "Hinky-Dink" and "Bathhouse John," conceived the idea that a nonprofit corporation should be the means of bringing public utility service to the people of Chicago at cost and putting an end to the notorious trafficking in franchises. These gentlemen organized the "Citizens Street Railway Association" under an Illinois statute providing for the organization of corporations "not for pecuniary profit." The articles of incorporation complied literally with the re-

quirements of that statute, and in addition a declaration by the incorporators was filed explaining that such a nonprofit corporation offered the only solution to the problem of the acquisition and operation of publicly owned utilities, especially street railways. That statement pledged that the new corporation would have no capital stock, would operate on rates fixed by the city, would operate at no profit, and that the city could retire the purchase bonds at any time and take possession of the plant.

At first impression this project seems to have had much to commend it, especially under then local conditions; but, unfortunately, the secretary of state—no doubt acting upon the legal advice of the attorney general—refused to issue a certificate of incorporation, and the public-spirited citizens were compelled to apply to the courts for an order in mandamus to compel the issuance of that certificate. So the great and good project became a failure when an Illinois court,[1] denied the mandamus, and declared that in spite of the plan for the operation of the new corporation it was none the less a corporation for pecuniary profit and could not be organized under the nonprofit statute. So it is seen specifically that citizens who desire to take over public functions and believe they know best can be out of character and violate the law, even though their intentions are most laudable.

VERY recently, in several states, groups of citizens have been inspired to resort to the nonprofit corporation as a means of acquiring, in a noble way (but in their own way), public utilities for the public. This movement may become widespread in view of the fact that the "death sentence" of the Public Utility Holding Company Act is inspiring programs all over the country for the local acquisition of the properties expected to be disposed of by the holding companies. These circumstances make this rather novel legal problem one of more than mere academic interest; and, purely as an adventure in hasty, speculative, and preliminary discussion, intended to stimulate the thought of others and a more thorough and complete exploration of the subject by more competent legal theorists, I propose to indulge myself in examining a few of the legal considerations involved.

I beg the reader to observe, however, that the device of the nonprofit corporation as an aid to public activities, whether of a governmental or a proprietary nature, is not necessarily confined to the field of public utilities, but may be resorted to for any and every purpose, if its fundamental legality, whether as an instrumentality of the state or as an independent ally, is once established. It could conceivably become a powerful agency for the transformation of our government. Any and every business enterprise might be acquired by nonprofit corporations as a medium for immediate or deferred public acquisition.

Perhaps, therefore, this immediate subject may have broad application and hold interest for general students of public law.

IN the first place, let us bear in mind that public entities, such as cities and other political or governmental sub-

[1] People *v.* Rose (1900) 188 Ill 268, 59 NE 432.

divisions of a state, formed for the exclusive purpose of operating publicly owned utilities, are each of them represented by public officers who are required to use their discretion in the public interest, and that directly or indirectly they are required to express, obey, and promote the will of the citizens they represent, as expressed by those citizens through the medium of one or another type of election. Let us also bear in mind that the methods and means and the terms and conditions upon which any public entity can acquire such utilities are expressly set forth in the statutes, and are exclusive of all other methods and means of acquisition.

The general usage in this country is that a vote of the electors must be had at some stage of the proceedings, whether it be upon the proposition to initiate acquisition of the property, or whether it be upon the financing of a specific program. In the past, the primary method of acquisition has been through the exercise of the power of eminent domain. More recently, owing to the development of the method of financing by the issuance of revenue bonds, there has been greater exercise of the ordinary power of negotiation resulting in a voluntary purchase and sale.

In any event, municipal corporations do not have the power themselves to organize nonprofit corporations in order to extend their power as to methods and means and conditions under which public utilities may be acquired for the public. Nor can public officers permit private individuals, through the medium of a nonprofit corporation, to establish the method, terms, and conditions of public acquisition so as to deprive or restrict them in the exercise of the discretion which it is their duty to preserve inviolate and to exercise independently. These principles, so faintly hinted at, are capable of extensive development and of concrete application to the problem under discussion.

In considering the nonprofit corporation, we must bear in mind that the law looks always to the substance of things and is not bound by the form in which that substance appears. A corporation cannot estop determination of its true character by merely declaring itself to be a corporation not for pecuniary profit; nor can such a corporation, even though it be in reality a nonprofit corporation, be used as a means of evading the principles of public law and the provisions of the statutes which control the public acquisition of public utilities.

¶ "VERY *recently, in several states, groups of citizens have been inspired to resort to the nonprofit corporation as a means of acquiring, in a noble way (but in their own way), public utilities for the public. This movement may become widespread in view of the fact that the 'death sentence' of the Public Utility Holding Company Act is inspiring programs all over the country for the local acquisition of the properties expected to be disposed of by the holding companies.*"

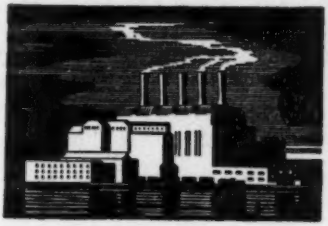
ORIGINALLY, and even now for the most part, nonprofit corporations, or corporations organized not for pecuniary profit, are authorized by the statutes and created and operated solely for *charitable, fraternal, educational,* or *religious* purposes. The reason for providing separately for the organization of such corporations (the right to take the corporate form being a privilege to be granted or withheld by the state) is that they are by common consent entitled to a special privileged consideration which is not granted to corporations for business purposes or for profit. One of the outstanding special privileges usually granted to such corporations is an exemption from taxation. As a rule this exemption does not apply to revenue-producing properties owned by such corporations even though the proceeds are employed in strict furtherance of the philanthropic objective. Thus, it is common to segregate the different properties of a charitable corporation and apply a tax exemption to part, and deny it in other part.

Consequently, it is apparent that the mere provision and pursuit of a nonprofit objective is not sufficient in itself to preserve the fundamental charactertistics and immunities of the corporation. If such a corporation were found to be deriving revenue from all of its properties and such revenue should be adequate for and devoted to the conduct of its praiseworthy activities, the corporation would lose its peculiar characteristics and the advantages which would otherwise have been derived therefrom. It would be nonprofit in name only because it has lost its advantages over the ordinary corporate form.

AT the outset then we note that a nonprofit corporation, owning a public utility, owns, exclusively, revenue-producing property and is not entitled to tax exemption, and has lost its most fundamental characteristic.

General business activity is another and more obscure field in which the corporation not for pecuniary profit is to be found. Several of the states permit the formation of a corporation for general business purposes, as distinguished from charitable, religious, and other similar purposes, under statutes establishing them as corporations not for pecuniary profit. This, of course, is a field which needs must be thoroughly investigated by the student who may be interested in the present problem, but since such investigation is beyond the scope of this article, we can here explore it only superficially. At the outset, however, I will state that many court decisions exist which have upset efforts of business corporations to masquerade, even with the most commendable intentions, as being legally organized under such nonprofit corporation statutes.

LET us, first, look over some of the reasons why a nonprofit corporation now appears in the field of public acquisition of public utilities. It is, of course, true that any corporation organized under the general corporation law of any state can operate without pecuniary profit by express intention, just as so many operate that way in spite of strenuous efforts to avoid it. Such a corporation could operate a public utility at bare-bone's cost, thus giving to the public most of the benefits that municipal ownership is expected to provide. Such a corporation



Power to Organize Nonprofit Corporations

"... municipal corporations do not have the power themselves to organize nonprofit corporations in order to extend their power as to methods and means and conditions under which public utilities may be acquired for the public. Nor can public officers permit private individuals, through the medium of a nonprofit corporation, to establish the method, terms, and conditions of public acquisition so as to deprive or restrict them in the exercise of the discretion which it is their duty to preserve inviolate and to exercise independently."

could offer the utility property to the municipality as a gift. Such a corporation could offer to create a trust for the municipality and the municipality could, if not contrary to law, accept or decline that trust.

All of these things could be accomplished without organizing, or attempting to organize, a nonprofit corporation and without transferring to that new corporation the common stock of the utility company. The holding companies themselves could effectuate such a program without the intervention of another agency, whether created by them or by a local group of citizens. However, even if such an arrangement were so set up as to be legally binding, that holding company, or that utility corporation, would not thereby transform itself into a nonprofit corporation. However noble and generous its objectives and its conduct might be, it would still remain a private corporation organized for profit. What then is the reason for the nonprofit form?

A CHARITABLE corporation is a corporation not organized for pecuniary profit only because its objective is charity—call it the gratuitous relief of the sick, disabled, unfortunate, and poverty-stricken. In contrast, a public utility, whether it is in fact operating at a profit or not, and whether the lack of profit is by design or by force of circumstances, is none the less organized for and engaged in the sale of a service or a commodity to people who pay for that which they receive, the wealthy and the poor alike.

A public utility, whether publicly or privately owned, does not and is not intended to provide free service to all.

At best it provides service at cost; but there is always a charge and the service cannot be obtained without payment of that charge. Such a corporation is a business corporation and is a corporation for pecuniary profit because it charges the full measure of the cost of its product, which includes the compensation of all of those engaged in its operation who thereby are enabled to make their living—and to make a living is to make a profit. (In fact, everyone is required to pay an income tax on such profits.)

When that utility is offered to the public, not as an outright gift at the cost of the owners, but on terms and conditions under which the public, as patrons of the service, must pay off the owners, the continued existence of the element of profit becomes most apparent.

Now let us see if we can find the reason for the creation of a nonprofit corporation in the chain of events by which the public may acquire a public utility. The owners of that public utility wish to be paid. Perhaps they only wish to be paid what their ownership is worth, what they have actually invested in it, or, on the other hand, perhaps they wish to be paid the highest possible price and the greatest profit which can be obtained. If those owners should endeavor to create a public trust under which the public would have to pay for the property, the legal imperfections (and the undesirability of the procedure) would seem to be readily apparent. Does the intervention of a nonprofit corporation *between* the private owners and the public change the true situation more than superficially?

The first thing that a nonprofit corporation does is to buy the utility, or take the first step toward that end by purchasing all of the common stock. At the very inception there must necessarily be involved the payment, or a contract providing for the payment, to the owners of the price which they are asking. If the nonprofit corporation has adequate assets of its own, and the payment must come out of the pockets of the incorporators, we can assume that the purchase price is arrived at by negotiations between two equal parties, one willing and able to buy and the other willing and able to sell, and each protecting its own interests. But suppose the nonprofit corporation has no assets. Then its only possibility of paying for the property is to make the property pay for itself, which is only another way of saying that the patrons of the service will pay for the property. Under such circumstances, the courts, if the question were properly presented, would inquire whether the purchase contract is void or voidable for impossibility of performance.

However, let us suppose that the nonprofit corporation is able to secure a loan adequate to permit it to proceed. If that loan is such as to permit the acquisition of the entire ownership of the property, the nonprofit corporation then becomes the owner and operator of a public utility, charging the public not only the cost of service, but charging such further sums as may be necessary to permit it to pay off the indebtedness incurred in order to acquire the property. The case would be less favorable to the nonprofit corporation if its loan permitted it to acquire only the common stock. Not only must

that loan be repaid out of the revenues from the profitable operation of the property, but in addition further deals must be made and further financing provided in order to acquire the balance of the ownership of the property. Thus it is seen that the nonprofit corporation is not a nonprofit corporation at all, and it could operate in exactly the same way, and with the same legal consequences, if it were organized openly as a corporation for pecuniary profit under the general incorporation laws.

It is not a nonprofit corporation because it is operating a profitable business and receiving the profits therefrom; and even if it should turn the profits over indirectly or ultimately to the public, it would be doing so only as a means of inducing and enabling the public to purchase, and thereafter operate for profit, a utility selling service to the public at more than the cost of operation — thus a profit-making enterprise.

I note in passing that for other legal purposes, a distinction might be made between profits devoted to paying for acquisition of the property, and later profits due to charges in excess of operating costs; but that distinction is not important here.

Now look at this nonprofit corporation from another angle—from the angle of the public. From that angle we shall be forced to give some consideration to principles of public law and to the charter provisions of municipal corporations. The municipal corporation has its own public officers and its own methods and its own means available for the acquisition of that utility if it should desire to acquire it.

But the nonprofit corporation, in effect, says either that the municipality does not know what is good for it, or is acting too slowly, and that therefore the nonprofit corporation will take the lead and force the issue and acquire the property, and, at some future date, turn it over to the municipality under its own terms and conditions. Or, on the other hand, the nonprofit corporation says to the public that under the statutes and your charter you do not have power to acquire this property, or your powers are in doubt, or your powers are withheld by an order of the courts, or can be held in suspense by litigation of various sorts, and therefore we shall proceed to act for you in our own way and without any of the restraints which are imposed upon you; and, in order to disarm suspicion

¶ "In *considering the nonprofit corporation, we must bear in mind that the law looks always to the substance of things and is not bound by the form in which that substance appears. A corporation cannot estop determination of its true character by merely declaring itself to be a corporation not for pecuniary profit; nor can such a corporation, even though it be in reality a nonprofit corporation, be used as a means of evading the principles of public law and the provisions of the statutes which control the public acquisition of public utilities.*"

and to place beyond controversy our own laudable intentions, we shall declare in our articles of incorporation as a nonprofit corporation that our purpose is that of acquiring this utility for the public without any profit for ourselves, and, in the light of that declaration, you will observe (says the nonprofit corporation) that we have created a trust for the public and our incorporators are mere trustees for the public, even though we shall determine what our compensation shall be for our services in acting as such trustees.

THIS line of thought could be, and has been, developed at greater length in actual practice, but the suggestion herein made is sufficient to understand why the intervention of a nonprofit corporation appears to protect and promote the public interest, at least to a greater extent than if the holding company itself professed a trust, or than if the intervening corporation were openly admitted to be a corporation for pecuniary profit.

The reasons for the present use by citizens' committees and holding companies may vary according to local conditions; but usually it originates in the reluctance of the holding company to sell and the reluctance or inability of the duly constituted public authorities to buy. In any event, the holding company would rather deal with a creature of its own making or one which is not in the favorable position that public authorities enjoy in such negotiations, by reason of their superior financial ability and by reason of their power to force a sale at a price fixed by impartial persons through the exercise of the power of eminent domain. The holding company knows that in the very nature of things the private committee can do nothing but sign on the dotted line, whether acting as a committee or as a nonprofit corporation, neither of which has a dollar of its own and cannot employ its own experts in engineering, accounting, and legal questions which are necessarily involved in the acquisition of a vast and complicated property.

FURTHERMORE, the holding company, perhaps willing to sell on its own terms, may still desire to retain the property if acquisition by the public is not inevitable. By creating or dealing with a nonprofit corporation which has no assets and can pay no dividends nor otherwise profit by its activities, and by impounding the earnings of the utility, and providing through contracts and understandings several different methods whereby the whole arrangement may be struck down and the parties placed in *status quo ante,* if the turn of events should make that advantageous to the holding company, a very pleasant situation is created which could not be created in any other way. The holding company can trust the nonprofit corporation—but no other.

Through the device of a public trust there is the further hope (a futile hope, in my opinion) that condemnation can be prevented, the jurisdiction of regulatory bodies defeated, and the benefits of tax exemption obtained. Those benefits of tax exemption may be used only to hasten the payment of the price, or to justify an increased price, or to paint a picture of benefits for the public from the trust, or for all three purposes at one and the same time. The benefit to the public is paraded as being the ac-

Nonprofit Corporation Instrumentality of the State

"If the nonprofit corporation engaged in purchasing the common stock of a utility is by reason thereof an instrumentality of the state, then a separate nonprofit corporation can be organized to acquire the preferred stock, and a third can be organized to acquire the bonds, and the final result would be three instrumentalities of the state; and then a fourth might be created by forming a corporation for the purpose of acquiring all the property from the three other corporations."

celeration in payment and the earlier acquisition of the property — which, however, is a benefit that the public can acquire without the assistance of the nonprofit corporation.

Let us briefly examine the supposed advantages of the nonprofit holding corporation. While it is generally true that the property of one subdivision of a state cannot be condemned by another subdivision for the purpose of being devoted to the same use, such a situation does not here exist. The private utility corporation still exists, and the greater part of ownership is still in distinctly private hands. This alone would seem to justify condemnation proceedings against the entire property. Also, the property of any nonprofit corporation itself—a private corporation —is subject to condemnation, and, even if a valid public trust has been created, the legal title in the hands of the nonprofit corporation can be condemned.

As to state regulation, the situation depends upon the statutes. The state always has the power to regulate its own creatures. Some statutes subject even wholly owned public properties to regulation. Ownership by a nonprofit corporation of only the common stock of a private utility does not in itself bar state regulation of the separate operating corporation.

Much the same reasoning applies to the question of exemption from taxation. In a general way, wholly owned public property, and the property of nonprofit corporations devoted to religious, charitable, or educational purposes, enjoys tax exemption, though in some states even wholly owned public utilities are denied the exemption. However, the present situation is not covered by these principles at all. Here we still have a private utility operating corporation and a private nonprofit corporation, neither entitled to exemption.

Is the situation of the nonprofit corporation bettered by the attempt at creation of a public trust?

It is possible that a true trust for the public might obtain tax exemption in some but not all states. Always the exemption of public property is dependent upon either ownership by a political or governmental subdivision or upon use for public purposes, or upon a combination of both. One line of thought and judicial decision denies the exemption even where the property of a utility is wholly owned and operated by a governmental subdivision itself, because the activity is proprietary and is for pecuniary profit. Partial ownership and partial profit often give at most only partial exemption. In my own state, like many (and I believe most) others, ownership is the sole test. In such states, the nonprofit corporation does not have even a remote chance of enjoying tax exemption, even if it should succeed in creating a public trust of a small equity in the common stock only of a utility.

A slightly different angle is illustrated in some of the court actions in which nonprofit corporations have been involved, where the position has been taken that such a corporation is, if not a political subdivision, at least a public corporation and an instrumentality of the state, and thus entitled to several different advantages, privileges, and immunities.

But the essential elements in true agencies of the sovereign are: complete public ownership, complete government control, absence of the constitutional protection of private property, and complete administration by public officers elected by the people or appointed by other officers elected by the people. Not a single one of these essential requirements is found in the nonprofit corporation. If any individual, or group, can organize a corporation, for any purpose, and by declaring it to be not for profit become an instrumentality of the state, what a monster would the state become!

It does not help their case that they are interested only in utilities — it might just as well be any property or activity of any nature which is within the almost limitless conception of a public purpose. There is no magic in the fact that utilities are sometimes self-supporting and even profitable in dollars, though other times they are not, for legal status as an instrumentality of the state does not depend upon such considerations. The state is too great a power thus to be made the subject of the caprice of every individual. Public power does not need such assistance, nor tolerate such interference.

Can all nonprofit religious institutions be instrumentalities of the states, though all state Constitutions profess the separation of church and state? Are the Elks, the Moose, the Bees, and the Daughters of I-will-arise, all instrumentalities of the state because they are incorporated and do not operate for pecuniary profit? Political clubs may be incorporated as nonprofit, promoting all kinds of opinion, and yet they do not become instrumentalities of the state. Since opinion differs on the desirability of public ownership—if not of one thing, then of another—is a nonprofit corporation, organized not to promote but to defeat public ownership, an instrumentality of the state? Can the state have instru-

mentalities devoted to both sides of the debatable question?

It has been the common practice in many statutes, particularly Federal, to employ such phraseology as "political subdivision, or instrumentality of the state." The meaning of such phraseology has never been clearly defined and probably never will be. The word "instrumentality" has been employed by reason of the fact that proprietary agencies, created and solely owned by a state (or the United States), have sometimes been held to be political (or governmental) subdivisions and sometimes not: It is a catchall phrase intended to cover this obscure field, but not intended to expand the powers of government.

IN the broad sense, every thing, even such as evidences of indebtedness, is an instrumentality of the state; but such things have no independent existence. They are merely a means to an end—the means by which a subdivision of the state carries into daily execution the powers conferred upon it. In the restricted sense in which it is used here, the term means the entity which employs the means.

A political subdivision of a state is, of course, an instrumentality of the state, but it gains nothing by having added to it the term "instrumentality." There are many private corporations which perform public functions, yet by reason thereof they do not become instrumentalities of the state. There are many private police forces, such as those of the railroads, which are engaged in enforcing law and order and thus furthering a fundamental duty of the state; but they do not thereby become instrumentalities of the state. The police force of a municipality is, in a true sense, an instrumentality of the state; but it does not have separate existence, for it is only a means by which the political subdivision, the municipality, accomplishes the purpose of its existence. A municipality could not, by incorporating its police force as a nonprofit corporation, create another, separate instrumentality of the state. The power to create instrumentalities resides alone in the state, and cannot be exercised and enjoyed by the subordinate creatures of the state. If this were not so, the process of creating ever new and additional instrumentalities of the state would be endless.

IN the case of a nonprofit corporation, just as in the case of a corporation for profit, it cannot acquire the character of an instrumentality of the state simply by reason of the fact that it was caused to be created by the officers of a political subdivision for purposes which that subdivision was itself authorized to pursue. These officers can

¶ "THE *nonprofit corporations organized by others, for purposes determined by them, and free from control except by statutes against fraud and crime, and so forth, are not adopted by the state as its own children, even though it legalizes their existence. The corporation not for profit is no more an instrumentality of the state than is the private corporation for profit.*"

act in such matters only as private individuals. They lose their special identity and have no greater rank than any other member of the public. The subdivision, as a corporate entity, cannot divide itself like an amoeba into two new subdivisions—and so on—thus multiplying instrumentality upon instrumentality. The private trustee of a trust in favor of the public is not an instrumentality of the state. Partial ownership and control of the corporation by a political subdivision cannot convert that private corporation into an instrumentality of the state; nor can a possibility and an expectation of future acquisition of entire ownership and control effect such a metamorphosis.[2]

In the case of the type of nonprofit corporation immediately under discussion, its inability to become an instrumentality of the state is equally complete whether its organization was procured by a holding company, a public power district, or by individuals. It is entirely immaterial to inquire who caused this private corporation to be created, and it is not necessary to inquire whether it is nonprofit or in fact for profit, and it is unnecessary to inquire whether its purpose is public benefit, and it is, finally, unnecessary to inquire whether its actual effect is public benefit. Not even the state itself—let alone one of its creatures—can create and employ a private corporation as its instrumentality for the performance of its public functions.

FURTHERMORE, in the special situation now under consideration, it remains to be seen whether or not the activities of the nonprofit corporation are in fact beneficial to the state. The nonprofit proponents of public ownership are distinctly naïve in supposing that their objective, and the method of attaining it, is necessarily of public benefit, especially where the objective is a particular property at a particular price. The nonprofit corporation appears in that which might be described as the rôle of the "unknown friend" when it takes upon itself the task of acquiring or aiding in the acquisition of a piece of property which the state has commanded one of its own subdivisions to acquire, or for the acquisition of which the state has provided its existing subdivisions with complete power in the premises.

If the nonprofit corporation engaged in purchasing the common stock of a utility is by reason thereof an instrumentality of the state, then a separate nonprofit corporation can be organized to acquire the preferred stock, and a third can be organized to acquire the bonds, and the final result would be three instrumentalities of the state; and then a fourth might be created by forming a corporation for the purpose of acquiring all the property from the three other corporations. The latter corporation might become necessary by

[2] For novel illustration see Bear Gulch Water Co. *v.* Commissioner of Internal Revenue (1941) 116 F2d 975, syllabae:

"A water supply company whose entire income consisted of receipts from sale of water to private consumers, and whose entire stock was owned by regents of University of California, was not a 'state' or 'political subdivision of a state' within statutes exempting from Federal income tax income derived from a public utility and accruing to a state or political subdivision of a state, where no part of corporation's income for years involved accrued to any one except the corporation . . . and did not accrue to the university until a dividend payable therefrom was declared by corporation. Revenue Acts 1932 and 1934, § 116(d), 26 USCA Int. Rev. Code, § 116(d)."

reason of the obvious fact that the interests of the three preceding corporations may well be in conflict.

YET again, other subdivisions of the state or other individuals, who may feel that public ownership is undesirable, might form a nonprofit corporation to acquire the ownership for the purpose of selling it back to a private corporation for profit.

Again, citizens who believe that an existing property should not be purchased, for the reason that it would be better to construct an entirely new plant, might form a nonprofit corporation to promote that objective.

Again, suppose, as frequently has been the case, that there are two poorer utilities in the same community, and one nonprofit corporation has as its objective the acquisition of one to the exclusion of the other, and a second such corporation has the opposing objective.

In all of these situations, are all of the nonprofit corporations instrumentalities of the state, or must we select one? Who wears the royal purple? Does not such a situation suggest the analogy of a masked ball where everyone appears in the same costume and a prize is given for identifying a certain person? In like case Old Father State would be hard put to it to sort his legitimate from his illegitimate children.

No, a nonprofit corporation is not an instrumentality of the state, but an instrumentality *of the individuals or corporations—public or otherwise—who caused it to be created* for their own purposes.

THESE nonprofit people do not help their case by declaring they hold property in a self-declared (and revocable) voluntary public trust—property which in reality they cannot pay for. True instrumentalities of the state hold property in trust because the property belongs to the people. A nonprofit corporation which hopes to acquire property, and only declares an intention to hold its hopes in trust, does not thereby become an instrumentality of the state —however mischievous a definition be given to that term. Why not let us all on our own initiative create instrumentalities of the state to acquire our own property, or the property of our friends, provided the public pays our price, even though we impound the profits—or the losses—during the interim of completing the benevolent project.

If a public power district—or any other governmental subdivision (like a city)—cannot procreate other governmental instrumentalities, how can a private utility holding corporation, created and organized under the laws of another state, possess superior powers of creation? Can three citizens, on their own initiative, do better?

IT is true that the state can confer upon individuals, acting by petition approved by government officials, the power to create governmental subdivisions of the state—or public instrumentalities—such as irrigation and other districts, and that these might be described as operating not for pecuniary profit and that they are corporations. But in such cases the state determines the purpose and the incidents of the creature it creates as its own legitimate offspring. The nonprofit corporations organized by others, for purposes determined by them, and free from control except by statutes against fraud

and crime, and so forth, are not adopted by the state as its own children, even though it legalizes their existence. The corporation not for profit is no more an instrumentality of the state than is the private corporation for profit. The fact of profit or absence of profit is not a dependable criterion. The statutes permitting nonprofit corporations never were devised to permit the creation of instrumentalities of the state, and the attempt so to make use of them is perversion and contrary to sound public policy and cannot possibly prevail.[8]

[8] See generally Fletcher, "Cyclopedia Corporations," Vol. I, page 58.

"'WHY *should the public be served with electricity by privately owned utilities?' asks the* MARION *(South Carolina)* STAR. *'For years this subject has been before the American people . . . That the utility companies pay taxes or represent private initiative or are already in business isn't going to be enough. The public cannot be expected to be satisfied with anything short of benefits it can understand. Do such benefits exist?'*

"The STAR *then proceeds to show that they do, pointing out that many of our cities and towns owe a large part of their development to local electric companies; that such companies brought in industries, developed the resources of their states, contributed to better farming, rural electrification, community projects, soil conservation, irrigation, and river developments; that they have long sponsored local improvements, home industries, community chest drives, and every form of local activity; that these facts are taken for granted by the community, and the private utilities do not get the credit they deserve.*

"Contrast this with government plants which pay no taxes, which make no contributions to local civic activity, and which shirk the financial responsibility that falls on local citizens for every phase of community life.

"It is amazing that the free boarders in the community, the tax-exempt government power projects, get the publicity and the hand claps, while the family provider, the tax-paying, private electric industry, gets the kicks.

"There is much merit in the STAR'S *contention that the private utilities have a better story to tell than their tax-exempt, government-owned competitors, and that the average citizen has much to gain from their success."*

—EDITORIAL STATEMENT,
Industrial News Review.

The Rural Electrification Job Remaining to Be Done

A reply to contentions recently made that REA can complete its statutory program without the necessity of additional authorization by Congress of funds for loans.

By CLAUDE R. WICKARD
ADMINISTRATOR, RURAL ELECTRIFICATION ADMINISTRATION

More than three million American farms have not yet been reached by electric power lines. The Rural Electrification Administration is hearing from the people on these farms by the tens of thousands. Their appeals are relayed to us, in the form of applications for loans to finance rural electric facilities, by farmer coöperatives to which they have applied for service. They are of one voice: They want electricity immediately.

Lifting of wartime restrictions on line construction shortly after VE-Day started a stampede to the offices of REA-financed coöperatives in every section of the country. A brief news item in an Oklahoma county seat paper, reporting that the local co-op planned early resumption of its line construction program, brought more than 500 applicants for service to the offices of the coöperative in two days. A few days later officers of the co-op were in REA headquarters seeking assistance in the form of a loan that would enable them to build lines to satisfy the demands of their clamoring neighbors.

A Kentucky coöperative applying for a new loan reported that volunteers from unelectrified communities in its territory went out to sign up prospective members. In a few weeks they turned in 2,800 signed applications. Furthermore, every farmer whose land would be crossed by the thousand-and-odd miles of line required to serve these 2,800 families had signed a right-of-way easement. Finally, to leave no doubt that they meant business, every one of the 2,800 applicants put up $5 for membership in the coöperative, to help defray the costs of the necessary

organizational work to the coöperative, which in this case amounted to only 47 cents per member. That is what was back of one application for a new REA loan.

From all over the country came similar loan applications, all supported by irrefutable proof that they represented recorded demands for service. There was no guesswork about it. The applicants had signed on the dotted line. And they had followed through with personal appeals that spurred their co-op officials to immediate action.

REA does not consider an application for a loan unless it is backed up by figures—figures that mean something—an actual count of consumers to be served, miles of line necessary to serve them, estimated costs, and potential revenue from consumers' power bills. REA's borrowers know this. Co-op officials come to REA with data to back up their requests for additional loan funds, and to justify the loans under the terms of the Rural Electrification Act of 1936.

On the strength of data submitted to us by our borrowers, we of the REA feel that we do not need to apologize for any figures we have ever used in our estimates of future requirements for rural electrification. There has not been a time since REA was created that measurable consumer demand for service has not exceeded REA's lending authority.

Congress authorized REA to lend $200,000,000 during the fiscal year ending June 30, 1946. By January 1st, all but $55,000,000 of this amount had been committed to qualified borrowers for loans pursuant to the Rural Electrification Act. As of the same date, REA had on hand, or in process of preparation in the field, more than $200,000,000 in applications. Thus, with the year just half gone, REA was $145,000,000 short of enough money to satisfy specific applications already in sight. This fact itself disproves the recently widely circularized claims of utility executives that REA already has sufficient funds on hand to do "its share" of the job of rural electrification.

By January 1st, REA borrowers in 21 states had been allotted loans up to the full amounts available to them from current funds. And still the applications were coming in—at a rate approximately twice that anticipated a year ago when the Department of Agriculture's interbureau committee on postwar programs published an estimate that REA borrowers could bring service to an additional 1,300,000 rural families in three years of normal construction. Again, REA estimates are exceeded by actual consumer demand.

REA will continue to base its estimates of future requirements on the current demands of rural people who want service. We believe our borrowers are better qualified than anybody else to provide the basis for such estimates. They are already operating nearly 450,000 miles of distribution lines that reach into more than two-thirds of all the counties in the United States. They know the people out past the end of the lines, at the fork of the creek, and back in the hills.

They think and talk in terms of living persons, potential consumers already counted, instead of basing plans on intricate statistical manipulations.

THE RURAL ELECTRIFICATION JOB REMAINING TO BE DONE

Many influential private utility executives have consistently made the mistake of relying on dead statistics for guidance in their farm electrification planning. When Morris L. Cooke, REA's first administrator, asked the industry in 1935 to take the lead in the recently inaugurated government electrification program, a committee of utility executives appointed to consider Mr. Cooke's request wrote him a letter in which the following amazing statement appeared:

> As a result (of past progress), there are very few farms requiring electricity for major farm operations that are not now served. Additional rural consumers must be largely those who use electricity for household purposes and where the total use should bear fair relationship to the cost of extending and furnishing service.

That statement was made at a time when less than 11 per cent of all the farms in the country had central station electric service. Today, more than ten years later and with less than 50 per cent of all U. S. farms electrified, spokesmen for the same group are frantically trying to convince anybody who will listen that the farm electrification job will be completed upon expenditure of present commitments by REA and the private power companies. And again they are trying to do it by putting into the record a mass of plausible but somewhat irrelevant figures.

An article by Grover C. Neff, president of the Wisconsin Power & Light Company, in the December 20th issue of PUBLIC UTILITIES FORTNIGHTLY, is an example.

This article presents a wealth of figures through eight and a half pages of space before it offers a specific summation of the subject of the article —"Rural Electrification's Real Objective." In the last paragraph it identifies that objective as "electricity at work on the farms." It will be recalled that the author was a member of a committee which more than ten years ago advised REA that there then were "very few farms requiring electricity for major farm operations that are not now served."

REA has continuously placed great emphasis upon the importance of effective utilization of electric energy on the farm. REA may quite modestly claim to have blazed the trail for a multitude of new farm applications of electricity which have contributed greatly to farm income and a better rural life.

But REA has *always* recognized that farmers must have electricity on their farms before they can use it. The *first* objective then must be to electrify rural America—to bring service to every rural community which desires it. That objective is far from realized.

The first step in electrifying farms is planning rural electric systems to serve

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entire rural communities. This is a type of electric distribution system which too few utility executives seem able to visualize. In Mr. Neff's PUBLIC UTILITIES FORTNIGHTLY article, he repeats the erroneous assumption that prior to 1935 the utilities had laid "the foundation for widespread rural electrification" by providing service for the smaller cities and towns. He persists in this error by asserting in his article that "a major portion of the job of building electric farm lines up and down the highways of the nation has been finished."

REA parts company with Mr. Neff's kind of farm electrification planning right at that point. REA is not interested merely in stringing power lines down highways. Our job is to take electricity to "persons," as potential rural consumers are called in the Rural Electrification Act of 1936.

THE utility industry does not seem able to see "persons" for the figures. In recent weeks practically all of the statistical material fed the American public by utility executives discussing rural electrification seems to have been carefully selected for just one purpose: to prove that the utilities have done such a splendid job that it is not necessary for the Congress to appropriate or authorize any more loan funds for rural electrification.

From the mass of figures presented by Mr. Neff—many inconsistent with each other and with other figures published elsewhere by spokesmen for the utility industry—one figure pertinent to the discussion of rural electrification's *first* objective does stand out. That is the estimate that the private utility companies plan in the next three years to connect 560,000 additional farms.

If we add the 560,000 farms to be so served to the 2,990,000 farms which earlier Edison Electric Institute estimates and year-end statement show as having been electrified by December 31, 1945—in contrast with Mr. Neff's figure of 3,100,000, taken by him from EEI earlier "statistics" — we get a figure of 3,550,000. This is the total number of farms which would, according to EEI's and Mr. Neff's statistics, receive service by December 31, 1948, exclusive of farms served by coöperatives and public bodies between January 1, 1946, and that date.

Preliminary Census Bureau reports, based on the 1945 Census of Agriculture, show slightly more than 6,000,000 farms in the United States. Subtracting the farms already served and those to be served by the private utilities in their 3-year program, as reported by Mr. Neff, there remain 2,450,000 farms. Of these, Mr. Neff indicates—without supporting facts or reference—435,000 will be "reached" but not served by the private utilities, and 40,000 will be served by utility districts and municipalities. If we accept these estimates, there will then remain 1,975,000 farms which will not be served by any agency or "reached" by the private company lines. According to Mr. Neff's own figures, this is the least number of farms to be considered by REA in its planning with reference to attaining the *first* objective of rural electrification.

IT would have been enlightening if Mr. Neff had devoted more of his article to discussion of the plans and estimates of the private utilities in at

Coöperation between REA and Private Utilities

"THE fact that hundreds of thousands of rural families are claiming REA assistance disproves any thesis that REA's part of the rural electrification program is completed. Acceptance by the utility industry of the plainly stated facts of the Rural Electrification Act would help to provide a solid basis for coöperation between power companies and REA coöperatives in achieving the FIRST *objective, electrifying rural America."*

least as much detail as REA has discussed and published its postwar plans and estimates.

A full, frank disclosure of where, when, and how the utilities would do the part of the job assigned or attributed to them by Mr. Neff would have been most refreshing evidence of a desire to coöperate with REA in attacking the *first* objective.

However, instead of presenting facts and figures with reference to the matters which are only within the knowledge of the utility industry, Mr. Neff somehow succeeds in eliminating —statistically—almost all these 1,975,000 farms as prospective consumers after expenditure of REA funds now on hand.

A STEP-BY-STEP analysis of this performance will serve to show clearly the fallacy of his conclusion that the *first* objective has substantially been achieved so far as REA's need for additional loan funds is concerned.

Mr. Neff stated first that 3,100,000 farms would have electric service by December 31, 1945. If, for the present purpose, we accept this figure, overlooking the fact that this is 110,000 more farms than EEI last officially reported, this leaves 2,900,000 of the country's 6,000,000 farms unserved.

Then, says Mr. Neff, EEI estimates, based on 1940 census figures—which are, significantly enough, not adjusted to December 31, 1945, although all other estimates are so adjusted—"that 900,000 more farms are reached by distribution lines but not yet taking electric service." These must therefore be excluded from consideration, which we shall do after expressing a wish that Mr. Neff had offered an explanation of the estimate in a February, 1945, EEI report on rural electrification that "about 750,000 of the unserved farms are adjacent to existing power lines." That leaves 2,000,000 (not counting the 260,000 lost by failure to use the latest EEI estimates and figures).

MR. NEFF then presented estimates that the utilities would connect 560,000 farms and the utility districts would connect 40,000 farms, leaving 1,400,000.

The next deduction is of 200,000 farms—a figure presumably based on a guess—without buildings or without occupied buildings. That left 1,200,000 farms which, based on Mr. Neff's computations and "deductive" process, are:

1. Not going to be served by the utilities, utility districts, or municipalities; and
2. Are "beyond practical reach" of distribution lines.

REA estimates that these 1,200,000 farms which have been left over to it by Mr. Neff will average not more than two to the mile of distribution line. That means that 600,000 miles of distribution line must be built by REA borrowers just to reach these farms. At present costs of $1,225 per mile of line serving two consumers, $735,000,000 would be the total cost of this line construction.

As of January 1, 1946, REA had available for construction of new distribution lines by its borrowers not more than $182,000,000. Deducting this amount from the $735,000,000 leaves $553,000,000 as the additional amount of money required to build distribution lines to serve farms which Mr. Neff's figures showed the utilities do not intend to serve, and which are, according to him, "beyond practical reach."

Understand, we are not offering this as an REA estimate. It is merely offered to counter figures already placed in the record which we feel are unrealistic.

Carrying the study of Mr. Neff's estimates a little further, however, it should be pointed out that his calculations entirely omit essential elements of the rural electrification job because they do not provide:

1. Any service to the millions of unelectrified nonfarm homes, schools, churches, stores, and small industries.
2. Any funds with which to connect farms located within a quarter of a mile of existing REA lines.
3. Any funds with which REA coöperatives could increase the capacity of their existing facilities in order to extend service into unserved areas, and to meet the increasing demands of their present consumers.
4. Any funds with which REA coöperatives could provide their own source of energy in those cases where power is inadequate or available only at prohibitive cost.
5. Any funds to take over the financing of TVA coöperatives as provided in the McCord Bill.
6. Any funds with which coöperatives could acquire existing facilities for the purpose of extending service into those areas which it might be impossible otherwise to serve.
7. Any funds which, pursuant to § 5 of the REA Act, coöperative members might borrow to finance wiring, water systems, plumbing, and labor-saving electrical equipment.

FUNDS to cover these necessary investments amount to a sizable total. Take the first item, for example. In very few places, if any, can lines be built to serve only farms. While REA's primary interest is in bringing service to farms, we recognize that nonfarm establishments must look to the same agency for service as serves the farms in the community. Except in rare instances, that agency is the only agency which can serve both. It is also very

often found that service to nonfarm establishments makes possible service to the farms in the community by furnishing the density required for service to the entire area. The Rural Electrification Act expressly defines the term "rural area" to include both the farm and nonfarm population of a rural community.

In his article, Mr. Neff dismisses the question of investments in generating plants, to serve REA-financed distribution systems, with a statement of opinion which is not supported by the facts. He says that the REA program has been expedited by reason of the fact that "adequate and reliable sources of power had been made widely available by electric utility companies at rates lower than the cost where coöperatives generate and transmit their own power supply." He refers to REA allotments for generating and transmission systems "that largely duplicate existing generating and transmission facilities" and asserts that the cost of power generated by REA-financed coöperatives "is equal to or higher than the wholesale rates charged by electric utility companies to REA distribution coöperatives in the same general localities."

REA acknowledges the contribution to the rural electrification program made by the great majority of the power companies in having provided adequate generating and transmission facilities to supply power to REA distribution coöperatives at reasonable rates in most sections of the country. However, REA denies any contention that the REA has made loans for duplicating facilities. It is the policy of REA not to make generating loans to supply any distribution coöperative that can get an adequate supply of power from other sources at reasonable rates.

As to the further charge that the cost of power produced in REA-financed generating plants is higher than the wholesale rates charged the coöperatives by electric utility companies "in the same general localities," the facts are that, practically without exception, REA generating and transmission loans have made power available to distribution coöperatives at rates substantially lower than those offered the same coöperatives by power companies before the construction of the coöperative generating facilities was considered.

A recently completed analysis of wholesale power costs to a group of distribution coöperatives in 13 states disclosed that the coöperatives in these states are paying approximately $2,265,600 a year less for energy than they would be paying under the rates existing prior to the time that construction of generating plants was considered by REA borrowers.

REA's consideration of all applications for generating and transmission loans is on a dollars-and-cents basis, with exclusive regard for (1) the best interests of these farm coöperatives in the light of their development and needs; and (2) the best method of expending available funds in the interests of the rural electrification program; *i.e.*, effecting a proper relationship as between funds expended for distribution lines and generating and transmission facilities. Where the best interest

of the coöperatives lies in the purchase of power from existing agencies, either privately or publicly owned, as is the present situation generally, we shall refuse approval of loan applications for generating or transmission facilities.

Under the terms of the Rural Electrification Act of 1936, REA cannot shirk the responsibility of making generating and transmission loans where necessary to insure to distribution coöperatives an adequate supply of power at reasonable rates. The law is very plain on this point. It says (§ 4) that the administrator is authorized and empowered to make loans "for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines, or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service."

THE Rural Electrification Administration, under the law, must at *all* times stand ready to assist *all* persons in all unelectrified areas to obtain *all* facilities needed to provide them with central station electricity. The only limitation placed on this responsibility is the requirement that REA loans shall be self-liquidating and that the administrator shall certify that in his judgment the security therefor is adequate and such loans will be repaid within the time agreed. It is impossible for REA to accede to the wishes of some utility executives to the extent of abandoning any phase of the REA program which comes clearly within the intent of Congress as expressed in the Rural Electrification Act.

We reiterate that rural electrification's *first* objective must necessarily be to bring central station electric service to every rural community in America that wants it. REA's experience has been that almost every rural community without electric service does most urgently want it.

To approach realization of this objective effectively, all agencies in the rural electrification field must recognize certain basic, noncontroversial facts; namely, that there are today more than 3,000,000 farms and as many nonfarm establishments in America's rural area without such service, and that the best hope for electric service to these 6,000,000 and more families lies in the application of the principle of "area coverage." This requires the abandonment of the concept of "building electric lines up and down the highways of this nation" as the job is described by Mr. Neff. Area-coverage rural electrification means leaving the highways, and going into the byways and back hills. It requires the cessation of "cream skimming" and "spite lines," the elimination of connection charges, of high minimums, of limitations on usage, and other repressive policies which are found practiced even today in some places by utility companies.

The first act of coöperation on the part of the utility companies, to evidence their desire to work together to attain the *first* objective of the rural electrification program, would be the discontinuance of their current widespread propaganda campaign aimed at shutting off further loan funds for REA's participation. Perhaps the next broad step would be the widespread adoption of a policy of making power available at wholesale to REA-financed systems at reasonable costs

and without restrictive, repressive conditions attached. The third is to stop spite-line and cream-skimming activities.

As long as there remain American families without electric service in rural areas, REA will continue to receive and process their applications for assistance under the terms of the Rural Electrification Act. No amount of statistical manipulation and deduction will dissuade REA from presenting to the Congress, through established channels in the manner prescribed by law, the needs of American farmers and their nonfarm neighbors for assistance from their government in securing for themselves this service.

REA has not attempted and will not arrogate to itself the function of allocating to the various agencies portions of the job remaining to be done. While it recognizes that there are areas in which the public utilities can most effectively render service, in the absence of adequate disclosure by the utilities of their plans, REA must consider *every* unelectrified rural establishment as part of the "market" for electricity and as a potential claimant upon REA for assistance.

The fact that hundreds of thousands of rural families are claiming REA assistance disproves any thesis that REA's part of the rural electrification program is completed.

Acceptance by the utility industry of the plainly stated facts of the Rural Electrification Act would help to provide a solid basis for coöperation between power companies and REA coöperatives in achieving the *first* objective, electrifying rural America.

Fewer and Bigger Farms

Of interest in connection with rural electrification problems is the census on farms in continental United States now being compiled by the U. S. Bureau of Census for the year 1945. A preliminary release by the bureau, dated November 12, 1945, indicated that the number of farms is diminishing, although the total acreage under cultivation is increasing. Census Director J. C. Capt said: "The preliminary totals are now 1,142,817,821 acres comprising 6,010,572 farms, compared with 1,060,852,374 acres and 6,096,799 farms in 1940." The Census Bureau statement continued:

"The loss of 1.4 per cent of the nation's farms since 1940 occurred despite the fact that numerous agricultural activities such as Victory gardens, which because of lower prices would not have been considered farms in 1940, were counted in 1945."

The 1945 census also included as farm acreage certain Indian grazing lands not so classified in previous census figures. A somewhat earlier preliminary estimate, dated May 7, 1945, released by the Census Bureau in collaboration with the U. S. Department of Agriculture, showed that the number of farm OPERATORS *in the United States decreased from more than 6,000,000 in April, 1940, to approximately 5,500,000 in April, 1944, a reduction of nearly 10 per cent.*

Alexander Hamilton's Company Sold to City of Paterson

It would be interesting to know, says the author, what that staunch advocate of private enterprise, the founder of this New Jersey venture, would have thought about its transfer from private to public ownership.

By ERNEST R. ABRAMS

THE other day the oldest privately owned utility in the country was sold to the city of Paterson, New Jersey. The story goes back to the founding of a company, or "Society," by Alexander Hamilton, who was not only our first and greatest Secretary of the Treasury but the greatest industrial promoter of his time. Yet, despite his demonstrated ability in government finance, some of his "hottest" business schemes went haywire. Particularly is this true of the Society mentioned, the Society for Establishing Useful Manufactures, which he founded 154 years ago.

Floated amid wild enthusiasm and granted a most liberal charter, it encountered serious financial difficulties even before the spot where it would do its establishing had been selected. Some of its directors and trusted officials lost their shirts—and at least the tail of the Society's shirt—during the panic of 1792; its chief planner nonchalantly tossed money around; its workmen proved inefficient and intemperate; and its manufacturing activities were so unprofitable that operations were halted within five years to put a stop to its losses. It worked out, but not along the lines planned.

During Colonial days, the British did their utmost to discourage manufacturing in America, contending that it could best and most profitably be done in England; and the lack of factories greatly handicapped the Colonies during and immediately after the War of the Revolution. So as soon as the shooting stopped and the Federal government had been established, government officials and businessmen alike sought ways of stimulating the production of goods that had to be imported.

On January 15, 1790, the House of Representatives asked Hamilton to assemble data on the status of manufacturing in the country and to suggest "the means of promoting such as will tend to render the United States independent of foreign nations for military and other essential supplies." A year later, after voluminous correspondence with manufacturers, merchants, bankers, and scientists at home and abroad, he handed Congress his famous "Report on Manufactures," which set the country agog. As *The American Museum* said in its April, 1791, issue, "capitalists who shall take good situations in the United States and establish manufactories by labour-saving machinery must rapidly and certainly make fortunes."

ANXIOUS to get in on those fortunes, Hamilton sponsored the Society for Establishing Useful Manufactures —soon to be dubbed SUM—in the spring of 1791 and even wrote the prospectus himself. "The establishment of manufactures in the United States when maturely considered," said his opening paragraph, "will be found of the highest importance to their prosperity. It seems an almost self-evident proposition that communities which can most completely supply their own wants are in a state of the highest political perfection." And, down in the body of the prospectus, Hamilton said that "there would be a moral certainty of success in manufactories" of paper; sail cloth, sheetings, shirtings, diapers, and Oznaburgs (whatever they are); the printing of cottons and linens; the small-scale production of cloths to be printed; women's shoes; thread, cotton and worsted stockings; pottery and earthenware; "chip hats"; "ribbands" and tape; carpets and blankets; brass and iron wire; and thread and fringes. As an auxiliary activity, he suggested the setting up of "a brewery for the supply of the manufactures."

Although many of Hamilton's personal friends were among the original subscribers, there is nothing to show that Alexander did any stock peddling himself. This appears to have been done by Elias Boudinot, Nicholas Low, William Constable, William Duer, Philip Livingston, Blair McClenachan, Matthew McConnell, and Herman LeRoy, who were named attorneys for the subscribers in securing the charter and attending to other preliminaries.

COLONEL Duer, one of the most powerful businessmen of his day, had been named Assistant Secretary of the Treasury by Hamilton. Boudinot, the only New Jersey resident, was a former president of the Continental Congress. Low and Constable were directors of the Bank of New York, and LeRoy and Livingston were soon to be elected to the first board of directors of the Bank of the United States. It is not surprising, then, that most of the money was raised in New York city.

Even while stock subscriptions were being sought, search for a scene of operations was under way. Some of Hamilton's group favored locating on the Delaware river in southern New Jersey, where a small waterfall was available and where able-bodied men could be hired for from $125 to $140 and women for from $35 to $40 a year. Others liked the spot on the Raritan river where New Brunswick is now

located. And still others preferred the region adjoining the Great Falls of the Passaic river, whose 70-foot drop made it the highest falls east of Niagara. But all were agreed that the site should be somewhere in New Jersey, since "the state . . . can feel the impulse of no supported interest hostile to the advancement of manufactures."

THE Great Falls site was finally chosen as offering more of the essentials of successful manufacturing than any other. The seemingly limitless power of the falls could be readily harnessed. Wood was abundant for lumber and fuel. The supply of unskilled labor was plentiful. And since beef was selling at 3½ cents a pound and mutton at 4 cents, wages were low.

Having hit upon the place at which to do its establishing, the attorneys for the subscribers immediately asked the New Jersey legislature for a charter, which was rushed through in jig time and signed by the governor on November 22, 1791, to become the first corporate charter granted by the state. In addition to the provisions usually found in 18th century charters, this one gave the Society perpetual existence, complete tax exemption of $4,000,000 of property, the power to "open and clear" rivers, the right to construct canals, and the power to condemn any private property it might need.

Nor is that all. The New Jersey legislators said that since "the first attempts toward the Establishment of Manufactories . . . may be attended with loss, so as to impair and diminish the capital thereof," the Society was authorized during its early years to raise $100,000 annually by one or more lotteries drawn within the state. This limitation on size was later erased. And, three days after the charter act was adopted, another act was passed empowering the governor to subscribe for $10,000 of the Society's stock in the name of the state. The Society's capital was fixed at 10,000 shares of $100 each, and it was to have thirteen directors, a governor, and a deputy governor.

WITH its charter in hand, the Society paid for its site at the Great Falls and began gathering materials for building its factories. Since spindles and looms for the weaving of cloth had to be bought abroad, it sent an agent to London with $50,000 to be deposited with the London partner of one of its directors. In addition, it gave Colonel Duer, its first governor, $10,000 with which to hire British tex-

¶ "DURING *Colonial days, the British did their utmost to discourage manufacturing in America, contending that it could best and most profitably be done in England; and the lack of factories greatly handicapped the Colonies during and immediately after the War of the Revolution. So as soon as the shooting stopped and the Federal government had been established, government officials and businessmen alike sought ways of stimulating the production of goods that had to be imported.*"

tile workers, since nobody in the United States had any experience in making the stuff, and to buy raw materials locally.

The directors also engaged as superintendent Major Pierre L'Enfant, the French architect who had laid out the nation's capital. But the Major considered his job that of a city planner with only incidental supervisory duties, and spent most of his time traveling around to see the layout of other communities. And when he did get back, his plans were so grandiose and called for so great an outlay that he scared the directors, who fired him. So the job, which paid $2,500 a year, was given to Peter Colt, state treasurer of Connecticut and a member of the celebrated shooting-iron family.

But the panic which hit the country in the summer of 1792 put a serious crimp in the Society's finances. Colonel Duer and three of the directors, who had overextended themselves in speculation, not only went bankrupt but, since they had been advanced funds by the Society for purchases of materials, it also sustained some loss. Then, too, many stock subscribers, who were supposed to pay their subscriptions in quarterly instalments, were hurt by the panic and couldn't or wouldn't pay up. And this combination of circumstances so scared the conservative stockholders that they refused to come to the rescue of the Society through the purchase of more stock.

DESPITE this shock to its finances, it had completed construction of a stone cotton mill, a wooden printing mill, and a large water wheel to drive its looms, spindles, and printing press by June of 1794. And, a little later in the year, it completed 15 double houses as living quarters for its workers arriving from England. But the Society was sorely in need of funds during this construction period, so it announced on New Year's day of 1794 that it would conduct a lottery.

In all, 38,000 tickets were to be sold at $7 apiece and $242,000 of the proceeds was to be paid out in 14,539 prizes. The remaining $24,000 was to go as commission to ticket sellers and the Society was to get its "cut of the swag" by withholding 15 per cent of the face value of the prizes. Here's how the prize money was to be split:

1 prize of	$20,000
1 prize of	10,000
2 prizes of	5,000
5 prizes of	2,000
10 prizes of	1,000
20 prizes of	500
100 prizes of	100
300 prizes of	50
1,000 prizes of	20
2,000 prizes of	15
3,000 prizes of	12
8,100 prizes of	10

Unfortunately, the laws of New York and the New England states prohibited the sale of lottery tickets and there weren't 38,000 suckers with money in New Jersey where they could be sold legally. So, after numerous postponements, the size of the lottery was reduced to $45,000 in November, 1795, with the Society's "take" sliced to $6,667.50; and while the drawing finally was held in the late summer of 1796, its extended promotion and postponements were so expensive that the Society lost money on the scheme. Thus, another of its activities proved unprofitable.

BY the end of its first five years of chartered existence, the Society

Data on Status of Manufacturing

"On January 15, 1790, the House of Representatives asked [Alexander] Hamilton to assemble data on the status of manufacturing in the country and to suggest 'the means of promoting such as will tend to render the United States independent of foreign nations for military and other essential supplies.' A year later, after voluminous correspondence with manufacturers, merchants, bankers, and scientists at home and abroad, he handed Congress his famous 'Report on Manufactures,' which set the country agog."

had received subscriptions covering $663,800 of stock, but only somewhere between $260,000 and $320,000, including $19,542 of U. S. government securities accepted in lieu of cash, had been paid in. In addition to its waterfall and 750 acres of land, it owned a mill building equipped to weave cotton cloth, a water wheel, and an uncertain number of workers' homes. The wooden mill for the printing of cloth had been washed away by an unprecedented flood in August of 1795.

But this doesn't mean that the Society had anything like $260,000 or $320,000 in cash or government bonds in its till. It had made outlays for land and the construction of its mills, water wheel, and workers' homes. Colonel Duer never accounted for the $10,000 advanced to him, although a few experienced textile workers did arrive from England and some raw material was delivered. Of the $50,000 sent to London to pay for machinery, about $40,000 was lost when the director with the London partner, with whom the money had been deposited, went broke during the panic of 1792. And operating losses, extravagances, and minor pilferings took another slice off the bank roll.

Not that the Society didn't try to recover from Colonel Duer and the London partner. In Duer's case, however, New York creditors grabbed his few unpledged assets before the Society's agents could cross the Hudson river, and he died a few years later in Debtors' Prison; and the Society did make a bold attempt to get that London money. Since this was before the days of transatlantic cables and news of the director's failure could reach his London partner only by boat,

it chartered the fastest vessel in the New York harbor and sent an agent to withdraw its $50,000, or what was left of it, before the London partner learned his firm was broke. Although the vessel beat the news to London, it took so long to unwind the red tape surrounding withdrawal of the money that another ship arrived and spilled the beans.

In addition to financial troubles, the Society's workers caused it no end of worry. Not only were its locally hired laborers unskilled but most of them had fought through the war with England and resented direction by nonmilitary superiors. They were, in addition, engaged in a constant feud with the British workers, whom they looked upon as natural enemies and at whom they took occasional pot shots. On the other hand, the British workers, while mostly experienced in weaving, were highly intemperate and too drunk most of the time to work. A visitor to the cotton mill reported seeing a British worker staggering out with a bottle of rum in his fist and hearing him shout, "This is the best country on earth. A man can get drunk here twice a day for 9 cents."

BECAUSE it couldn't operate its cotton mill at a profit in the face of growing competition from New England mills, the Society stopped all manufacturing activities in late 1795, and a move got under way the next summer to dissolve. But a few farsighted stockholders, recognizing the latent value of its perpetual charter and the unusual powers granted by it, killed the idea at a stockholders' meeting in October. So a new board of directors was elected and complete cessation of manufacturing activities was approved.

This new board held office for eighteen years, largely because only two stockholders' meetings were held between 1796 and 1814. During this period, some cash rentals were received from the cotton mill and its lands, averaging $1,390 a year between 1804 and 1806, but when the cotton mill was destroyed by fire during the winter of 1806-7 with a loss of $17,885, of which only $6,500 was covered by insurance, its annual income was reduced by $525.

Although the treasurer's books had disappeared some time earlier, the Society's holdings were estimated to be worth $120,000 in the fall of 1815. While this was less than half the original investment of the shareholders, it was about twice the estimate of Governor Bloomfield in the summer of 1808. One of the reasons for this doubling of value was that Paterson, the mill town established by the Society and named for the New Jersey governor who signed its charter, was growing. Its population increased from 4,787 in 1824 to 9,085 in 1835, to 11,000 in 1845, and it was incorporated as a city in 1851. And since the Society owned considerable land in and around Paterson, this continuing growth boosted the value of its holdings to $800,000 by 1830 and to a million more by 1845.

FOR close to a century after it quit operating its cotton mill, the Society did little more than sit on its charter and await developments, which it could easily do with no taxes to pay. It sold a hunk of land occasionally to keep itself in spending money, but

since the area was increasing in population and industrial activity, it mostly rented its holdings. It certainly was not active in establishing useful manufactures or doing much of anything else for which it was chartered.

It did, however, engage in one activity, hardly contemplated at the time it was chartered, which brought down upon it the wrath of numerous New Jersey communities. With its lawyers claiming that the charter power to "open and clear" rivers gave it title to river beds and the waters flowing in them, the Society cracked down on any community using these waters for the benefit of its citizens. The city of Paterson had to pay $1,000,000 to withdraw water from the Passaic river. Newark had to kick in with $35,000 to divert water from one of the Passaic's tiny tributaries. And Jersey City was charged $250,000 for the privilege of taking water from another stream.

PERHAPS the prize instance of exacting payment for use of the waters it controlled, however, was when a water supply district in the northern part of New Jersey built a dam on the Wanaque river to insure a purer and more adequate water supply. But the Wanaque emptied into the Pompton river which, in turn, flowed into the Passaic, so the Society entered a claim for damages on the ground that the waters of the Wanaque were its property. Eventually, it collected $225,000 in compromise of its claim.

This was, obviously, not the way to make friends, although it could influence people to hate you, which is just what happened in that portion of New Jersey affected by the Society's water policies. So, after a time, when the issue of ownership of the waters of the Passaic and its tributaries began to boil, the Society sold all of its rights to the use of these waters for municipal and industrial purposes, but not for the generation of electricity, to the East Jersey Water Company.

In 1882 the Society still owned the power rights at the Great Falls of the Passaic at Paterson, which were capable of producing an estimated 2,018 horsepower. Of this total, 1,836 horsepower was developed by its own water wheels and the balance by industries at the falls to which the right to develop power had been leased. But when Thomas Edison established the world's first practical electric utility in New York city in the fall of that year, the death knell of water wheels was sounded. While electricity could be carried many miles to distant factories, water-wheel power could be used only by industries at the falls, where their machines could be geared directly to the water-spun wheels.

SO the Society quickly ripped out its water wheels and installed turbines to convert the energy of falling water into electric power, which could be carried to communities and industries far removed from the falls. And because the flow of the Passaic was unstable the year around, and the amount of electricity that could be produced and sold varied with stream flow, it built a large steam-generating plant to bolster its unstable water power.

For close to sixty years now, the Society has been primarily an electric utility with incidental real estate holdings. About two-fifths of the current

it generates has been sold to a few large industries and the balance to another utility for distribution to the public. In recent years, it has also owned eight factory buildings, some twenty parcels of unimproved land, and valuable riparian rights on the Passaic and its tributaries.

Although tax exemption kept the Society alive during its early years, and was of great advantage during its entire life, this charter provision was eventually to cause its downfall. While its holdings, assessed at $1,387,500 but reputedly worth $4,000,000, enjoyed fire and police protection and all the other benefits a modern community provides, it wasn't contributing one thin dime to their support. In the "good old days" nobody thought much about it; but when the business depression of the 1930's hit the land, and states, counties, and cities were hard-pressed to find funds not only to carry on customary activities but to meet relief demands as well, folks in New Jersey decided it was time to put an end to the Society's tax exemption. They had one precedent in their favor, since the Society had been required to start contributing to the support of public schools in 1916.

DURING a 12-year legal battle that followed, counsel for both sides frisked the decisions of the U. S. Supreme Court to find some support for their contentions. The Society's lawyers dug up the Dartmouth College Case, in which the Supreme Court held in 1819 that a charter was a contract between a state and a corporation, which could not be altered without the consent of both parties. The attorneys for New Jersey and the city of Paterson bounced back with the Charles River Bridge Case, in which the court held in 1837 that a special franchise, granted to permit the exercise of a public benefit, might be revoked through misuse or nonuse; but when the court of last resort in New Jersey upheld the validity of the Society's perpetual charter with its tax exemption provision, both the state and the city were at the end of their legal ropes.

The people of northern New Jersey, however, didn't give a whoop what the courts might say. They wanted that tax exemption removed and lost no time in telling the Society about it. It so happened, control of the Society had been lodged for some years with the New Jersey General Securities Company, an investment company owned by New York and New Jersey financial interests, who did not relish the thought of a public scrap.

HAVING tested the public's temper, the Society's directors, after numerous talks with Paterson city officials, decided to sell the whole outfit to the city of Paterson for $450,000. The transfer took place on the morning of October 22, 1945. An hour later the 154-year-old Society for Establishing Useful Manufactures was dissolved. Few folks realized that in this transaction the oldest privately owned utility in the country passed into public ownership.

It would be interesting to know what Alexander Hamilton, that staunch advocate of private enterprise and "father" of the Society, would have thought about this deal. But no one will ever find out.

Government Utility Happenings

BUREAU OF RECLAMATION has begun awarding contracts for construction projects scheduled in its recently announced $140,000,000 development program for 1946. The program, as reported to the Secretary of the Interior by Commissioner of Reclamation Michael W. Straus, calls for construction on 30 projects in 17 western states.

Approximately $14,000,000 has been earmarked by the bureau for Missouri river basin development. This fund is to be used in starting construction and planning on 3 major projects and to complete engineering and economic surveys on 26 others.

Major Missouri basin projects scheduled in the program are: Boysen dam and power plant on the Big Horn river, Wyoming; a dam on the Cheyenne river near Hot Springs, South Dakota, to provide water for the Angostura irrigation project; the Kortes dam and power plant on the North Platte river near Casper, Wyoming. The bureau also will begin construction of 290 miles of transmission lines and other facilities for bringing power from Fort Peck dam for use of the Corps of Engineers at Garrison dam.

All these projects have been approved, several of them during recent sessions of Congress. In addition, Commissioner Straus reported, the bureau is completing investigations on 8 other projects in the Missouri basin preparatory to starting construction this year "if Congress makes the necessary funds available." These studies cover the proposed Canyon Ferry and Marias projects in Montana, Heart river project in North Dakota, Frenchman-Cambridge project in Nebraska, Bostwick project in Kansas and Nebraska, Owl Creek and Glendo projects in Wyoming, and the Kirwin project in Kansas.

THE bureau will carry out an $18,749,000 construction program in the Columbia river basin, including extensions of a vast irrigation system bearing water from the reservoir of the Grand Coulee dam to an initial 400,000 acres of sagebrush land in Washington state. Extensive construction also is planned at Grand Coulee, including work on the power plant and pumping plant.

A $35,000,000 construction program will be launched in the Central valley of California, Straus added. This work will include completion of facilities at Shasta, Friant, and Keswick dams, and continuation of work on the Friant-Kern canal, the Delta-Mendota canal, and other irrigation projects. Transmission lines will also be built and additional generating equipment installed.

Comprehensive reports on resource development plans for 15 major river basins of the West are being prepared by the bureau, Straus said. The Missouri basin plans already have been completed and reported to Congress, and the bureau expects to complete studies for the others this year. The "basin reports" include a total of more than 400 irrigation and multiple-purpose projects for projected development.

* * * *

POSSIBLE conversion of the government's major oil pipe lines for transportation of natural gas was given a bleak view in the recent pipe-line disposal report of the Surplus Property Administration.

Disposal for conversion to natural gas,

the report stated, "will be favored only if it proves impossible to keep the lines in petroleum service and the national security is otherwise adequately protected."

The SPA report to Congress on the "Big Inch" and "Little Inch" lines, which were built during the war at a total cost of $145,800,000, came as a surprise to observers in the industry and in Washington. Previous indications had been to the effect that the big lines could not be kept in petroleum service because of economic factors.

Disposal of the lines had previously been studied during extensive hearings before the O'Mahoney subcommittee of the Senate Military Affairs Committee. This body was told by a group representing all branches of the petroleum industry that the major pipe lines could not fit into the peacetime economy of the oil industry and that the lines should be disposed of, if possible, for other purposes. At least two other groups appearing before the O'Mahoney committee suggested plans for purchasing "Big Inch" and "Little Inch" for conversion as natural gas carriers.

The Reconstruction Finance Corporation, which operated the lines during the war, also produced evidence against the advisability of continued use of the lines for petroleum. An industrial engineering firm, which made a study of pipe-line operation at the request of RFC, reported that the lines could not be utilized economically in the postwar period for purposes other than natural gas transportation.

SPA officials, however, declared that these surveys did not explore the full economic picture of possible petroleum use of the lines. They added that use of the lines for natural gas purposes may not be feasible because of the conversion problems which would arise in the event of a future emergency requiring return of the lines to oil transportation.

Their report suggested the following procedure for disposal of the two lines, listed in the order of their preferability:

1. Sale of the lines to private interests, with opportunities for purchasing them extended to all segments of the petroleum industry, particularly small, independent operators.

2. Leasing of the lines to private interests if they cannot be sold.

3. "Public operation on a full cost basis may have to be considered," if all efforts to dispose of the lines to private industry fail.

* * * *

FULL-SCALE development of power facilities on Interior Department projects and encouragement of public and coöperative distribution agencies high lighted a recent statement of power policy by Secretary Harold L. Ickes. Ickes quoted 13 public laws, dating from the Reclamation Act of 1906, in support of his policy outline. Principal features of the statement were:

1. Installation of hydroelectric generating facilities on all projects where feasible. Installation of steam stand-by and reserve facilities where necessary to independent operation on an economical and efficient basis.

2. Facilities shall be installed to provide the type of power and service required by public agencies and coöperatives. Transmission outlets to existing and potential wholesale markets shall be adequate to deliver power to every preferred customer upon reasonable terms. These facilities must be owned by the government unless privately owned facilities are available upon terms which assure full accomplishment of these objectives.

3. Active assistance, from the very beginning of the planning and authorization of a project, shall be given to the organization of public agencies and coöperatives for the distribution of power.

4. Resale rate and other provisions shall be included in wholesale contracts with distributors to insure that power is furnished to the ultimate consumer at lowest possible rates . . . Contracts with privately owned companies shall be limited in time and shall contain provisions for cancellation or modification by the government.

* * * *

DESPITE wartime shortages of labor and materials, the Rural Electrification Administration expanded its lending activities and noted increasing activities of its borrowers during 1945. According to REA's annual report, recently

submitted to the Secretary of Agriculture, the agency advanced $40,000,000 during the past fiscal year and electric service was extended by its borrowers to 135,000 rural power consumers. Administrator Claude R. Wickard declared:

> During 1945 the total number of new connections by REA borrowers was just about as great as the annual average during REA's entire history. . . .
>
> Allotments during the year totaled $66,000,000. As a result, the backlog of funds allotted but not advanced, which stood at $111,000,000 at the beginning of the fiscal year, was increased to $138,000,000 on June 30, 1945. In addition, toward the end of the year, there was a steady increase in applications for additional funds.
>
> Pending applications rose to $140,000,000 by April 30th, $170,000,000 by May 30th, and $225,000,000 by the close of the fiscal year. Against that sum, for the fiscal year 1946, REA was authorized by the Congress to allot a fund of $200,000,000. This sum is $60,000,000 larger than the amount available in 1939, the former peak year.
>
> Now we are on the threshold of the greatest period of activity in REA's history. I am positive that . . . this agency . . . will continue its past successes in bringing electricity to the nation's unelectrified areas.

The report stated that rural electrification has expanded "more than fourfold" since the creation of REA in 1935. Nearly 45 per cent of rural America is now enjoying electric service, REA estimates.

OFFICIALS of the agency feel that congressional approval of the Department of Agriculture Organic Act in September, 1944, is largely responsible for recent increases in applications for electrification loans. A portion of this act provided for the reduction of the interest rate on REA loans to 2 per cent and increased the amortization period from twenty-five years to thirty-five years.

Relaxing of restrictions on materials by the War Production Board permitted REA approval of 80,550 applications for loans for constructing power-line extensions. This total, REA says, was somewhat higher than the average number of connections completed annually by borrowers previously, and "it indicated the speed with which electrification of rural areas would progress when it would become possible to enter on a construction program unhampered by necessary wartime restrictions."

Because materials were not available during most of the year, many loan applications were approved and the funds withheld until construction could get under way. Against the total of more than $502,000,000 allotted by REA to its borrowers for specific undertakings as of July, 1944, only slightly more than $389,000,000 had actually been advanced to borrowers. Of the balance, about $105,000,000 was allotted for construction and was available for use as soon as restrictions were lifted. In addition, after the removal of restrictions, REA approved applications for loans from the $80,000,000 loan fund in the 1946 Agricultural Appropriation Bill.

During 1945 REA borrowers continued to purchase existing power systems. In the past ten years 403 such systems, or portions of systems, totaling 15,037 miles and serving 145,866 consumers, have been purchased by REA borrowers for a base purchase price of $26,565,198.96. To these systems the new owners since have added 33,107 miles of rural extensions to serve an additional 91,741 potential consumers. At the close of the past fiscal year, the total amount of funds which provided for the purchase of the acquisitions, rehabilitation, incidental expenses, and the cost of new construction was $63,446,716.57.

During the greater part of 1945 REA-financed groups devoted much of their efforts to extending connections and maintaining service to farms already receiving power. The number of consumers served by these systems was increased to a total of 1,287,347 during the year, an increase of 135,316 over the 1944 total. Plans also were made for the line-building program scheduled to begin with the release of materials and labor.

REA engaged in a number of somewhat "extracurricular" — though certainly pertinent — activities during the period reported upon. Among these

was its "missionary" work in educating consumers and prospective consumers in the utilization of electric service. The report describes this activity as follows:

> Publishers, particularly in the textbook field, were interested in receiving material on rural electrification and its socio-economic impact on the nation. Articles, background material, and photographs were prepared at the request of educational publishers. The American Education Press published a noteworthy feature on rural electrification for its grade-school readers.
>
> Visits were paid to 8 state departments of education and 12 state teachers' colleges for the purpose of exchanging knowledge on the position of rural electrification in teaching curricula at the various levels. Rural electrification as a field of study was discussed at 3 college workshops on rural education in which a representative of REA participated by invitation. . . .

A definite legislative program was followed by REA borrowers during the year, the report reveals:

> A congenial framework of local statutes being of basic importance to the development of rural electrification, REA borrowers in the several states continued during the fiscal year to maintain a high degree of interest in state legislative developments.
>
> Measures affecting the rural electrification program were considered in several of the 44 states in which regular legislative sessions were held in 1945. Many legislative bodies demonstrated a commendable readiness to adapt state laws to the needs of the REA-financed systems while others, due in some cases to power company pressure, seemed reluctant to act favorably on coöperative sponsored measures.

REA co-ops became increasingly involved in litigations during the year. The report gives this explanation:

> Continued efforts of opponents of the rural electrification program to circumscribe the development of rural lines on an area-coverage basis have increased the number of court actions and commission cases in which REA borrowers have become involved.

PROBLEMS of taxation also received much attention from the REA coöperatives. According to the report, property taxes held the spotlight, and for the most part the co-ops' activities involved hearings before tax commissions and other assessing bodies "to obtain reasonable assessments."

"In general," the report concludes, "the coöperatives were successful in their efforts to secure reasonable assessments for property tax purposes. Valuations remained at a level fairly consistent with assessments that prevailed last year in all but a few of the states. Reductions were granted in Idaho, and proposed increases were prevented in whole or in part in Alabama, Arkansas, Kansas, Missouri, Tennessee, and Texas. The coöperatives in Colorado, however, were dealt a serious blow when tax valuations were sharply increased."

REA's 926 borrowers, to whom a total of $427,566,738 had been advanced during the ten years ending in 1945, largely have managed to meet payments of principal and interest on these loans as they have fallen due. The report shows that only 84 borrowers have failed to make such payments more than a month after they were overdue. On the other hand, 680 borrowers had made advance payments totaling $19,274,184. Of the total amount due and payable as of June 30th on outstanding loans, $453,426.58—about one-half of one per cent—was in default more than thirty days after due date. The report adds:

> One of these delinquencies involved REA's first foreclosure—that of the loan mortgage held on the properties of the Ocracoke Power & Light Company, a small generation and distribution utility serving dwellers on Ocracoke island, North Carolina. . . . The total advanced under the two notes executed was $46,000, and up to the date of the foreclosure (December 28, 1944) none of the $1,562.85 principal due and payable had been paid, and $5,081.18 of interest was due and unpaid.
>
> The property mortgaged in support of the loan was sold at public auction, purchased by the Federal government, and operated under its supervision from December 28, 1944, to February 27, 1945, when it was sold to a newly formed rural electric coöperative for $17,450. This left an amount of $28,550 principal and $5,081.18 interest owing by the original borrower. . . .

All monies received as a result of operations carried on during the period of government control are being returned to the Federal government, the report stated.

Wire and Wireless Communication

IF any sizable number of people want what they say over the phone recorded, the telephone company hasn't heard anything about it. In fact, Keith S. McHugh, vice president of the American Telephone and Telegraph Company, indicated before the Federal Communications Commission on January 10th that the last thing the average person wanted was a permanent echo of what he had told Aunt Minnie or any other caller.

Mr. McHugh prepared testimony for an FCC investigation into the need for telephone-conversation recording devices and possible means for letting subscribers know when conversations might be recorded. He said that, should recording machines become commonplace, many users would become phone shy because of shaken "confidence in the privacy of calls."

Of course, he said, the company "has no objection to recorders on private telephone lines not connected to the general exchange telephone system."

McHugh's testimony emphasized the fact that the telephone industry has constantly sought throughout the years to impress upon telephone conversation the character of a confidential communication comparable as near as possible with face-to-face conversation. He pointed out that if the average citizen, engaged in face-to-face conversation were suddenly apprised of the fact that his remarks were being surreptitiously recorded, without his knowledge or consent, he would naturally be outraged. The witness did not see why the telephone-using public would not react similarly to any widespread use of recording devices in connection with telephone conversation.

MCHUGH said that three different forms of protection had been considered in connection with proper or legitimate use of telephone conversation recorders. At least two of these, he admitted, were of doubtful value. First, there was the idea of a special directory listing, placing a star or asterisk beside the party's name in the telephone book where a phone known to be using a recording device was listed. The obvious difficulty with this proposal would be that it would afford no protection whatever to the party who might be called from a telephone station so listed. It would only afford "one-way" protection to the party making a call after looking up the number in the directory.

The second proposal mentioned was the use of a warning tone superimposed on the recording device so that the parties at either end of a telephone conversation would know that a recording device was being used. Aside from the obvious practical difficulty of enforcing regulations for the exclusive use of devices which incorporated such a warning tone feature, McHugh said that only a small percentage of the people using telephones would ever be exposed to the use of the recording device, and so would not be familiar enough with the tone to recognize its significance.

One other protective measure commented upon by McHugh was the "oper-

ator announcement" arrangement. Under this setup the use of a recording device would be authorized only in connection with special telephone lines routed through a special board in the telephone company's central station, on which periodically an operator announcement would break into the conversation with the statement, "This conversation may be recorded," or other words to that effect.

McHugh said that the difficulty with this form of protection right now is the fact that it would take a considerable amount of special equipment and central station capacity just at a time when the operating telephone industry is straining every effort to catch up with the large backlog of demand for normal telephone service accumulated during the war. He added, however, that the Bell system would coöperate to the best of its ability in any attempt to work out this or any other protective measure to avoid the abuse of recording devices if the FCC should determine upon such course of action.

COLONEL William C. Henry, president of the United States Independent Telephone Association and general manager of the Northern Ohio Telephone Company, appeared on behalf of the independent operating companies throughout the country. His testimony largely followed the line taken by Mr. McHugh, except that he emphasized the inability of the smaller independents to devote their available supply of labor and materials at this particular time to any program involving costly and extensive protective arrangements against the abuse of recorders. He added, however, that the independents feel just as much as the Bell companies that unauthorized use of recording instruments which would shake the public confidence in the traditional secrecy of telephone conversation is a challenge to the industry and the public interest.

Elliott Lovett, attorney for the Soundscriber Corporation, told the FCC that "telephone recorders have gained wide public acceptance as an important adjunct to efficient business and government administration." Lovett said:

> A warning notice to the outside party is unnecessary because of the public acceptance of electronic or mechanical recording and of secretarial monitoring of phone conversations. If any notice should be held desirable, a notation in connection with the subscriber's listing in the directory would suffice.

One interesting development on the other side of the picture was the disclosure of the attitude of the U. S. Navy Department. The Navy revealed that during the war it had installed over 1,600 recording devices for use with telephone conversations in various naval shore installations throughout the country. These devices, it was said, have proved of considerable value, first as a means of preserving "confirmation records," eliminating confusion and misunderstanding; and, secondly, as a means of preserving more permanent records.

The Navy Department statement rejected the idea that secrecy of ordinary telephone usage would be materially affected any more through the use of recording devices than heretofore. It was pointed out that businessmen and others have long made use of silent stenographers taking down notes through extensions cut in on telephone conversations, so as to make a record thereof. Sometimes this has been done with the knowledge and consent of both parties to the conversation, and sometimes otherwise. It was argued, however, that the use of a business machine to fulfill the same function previously performed by a living stenographer was not of itself an invasion of the privacy which the great mass of the telephone-using public can reasonably expect.

THE Navy Department statement also disapproved of the contention that the use of the modern style recorder constitutes a violation of the old regulation of telephone companies against the use of so-called "foreign attachments" to telephone instruments or facilities. In this connection it was observed that many modern recording devices do not need physical contact with telephone wires or

other facilities, but, by use of induction coils or employing accoustical art, recordings can be made of telephone conversations without physical contact. For this reason, it was said, the "foreign attachment" regulation has become outmoded in its application to recording devices.

Those in attendance at the FCC hearing were somewhat surprised at the number of telephone recording devices said to be in existence. One manufacturing concern indicated that it had knowledge of 5,000 of such instruments now in operation.

Another device manufacturer indicated that perhaps a similar number of its products are being so employed. If these were to be added to the number admitted to be used by the Navy, plus an indefinite number of other devices so employed, some of which were not originally designed for use with telephone conversations, a very rough estimate of perhaps as many as 15,000 recording devices now in use throughout the country is suggested.

* * * *

DIAL installations in cities such as New York and Washington helped ease the burden of the recent telephone strike on the great mass of residential subscribers. At least they provided local telephone communication during the early days of the strike. In New York city, for example, 95 per cent of some 1,100,000 telephone subscribers had dial phones, and only one out of five boroughs —Staten island, with a population of 180,000—was completely without dial service.

New York city subscribers, incidentally, have 2,000,000 telephone instruments, and the hook-ups operate along nine and one-quarter million miles of telephone wire within the city limits. The subscribers include business concerns, hospitals, hotels, newspapers, and other plants or institutions to the number of 28,000, which have their own private branch exchanges, or switchboards, operated by their own personnel. These boards alone are connected with 700,000 individual telephones.

Such switchboards, however, are owned by the telephone company and are repaired and maintained by telephone company employees. If they should break down it is possible that repairmen might not be available and they would be crippled.

The 28,000 private exchanges account for more than half the daily telephone traffic in New York city which, during December, reached the record daily average of 12,257,000 calls. The average thus far this month has been 11,500,000. These averages represent a tremendous postwar jump over pre-Pearl Harbor traffic, which ran to 8,500,000 calls a day in New York city.

The disaffection in telephone company ranks resulting in the strike of 7,700 telephone installation workers hit the corporation hard. There were 235,000 applications for new telephones before the installation men quit and the list grows daily.

In spite of the dial system, the New York Telephone Company uses 10,000 telephone operators. These work chiefly on information service, on suburban circuits, and in the manually operated exchanges still in existence. The company's total number of employees is approximately 27,631.

Spokesmen for the company reported that they did not anticipate a halt in their weather service as the weather information goes out on a ticker-tape system. On the other hand, there was a possibility that there could be interruption of the company's time service.

THE New York city police department, which is largely dial system, anticipated no interruption of service. Francis A. Burns, telegraph superintendent, explained that the police telephone system had a labor union guaranty against stoppage, as police work comes under the "emergency service" clause. The same, generally, is true of other vital city services—the fire department, the hospitals, ahead of all others. These departments have their own maintenance crews and keep emergency equipment on hand to meet possible breakdowns.

Mr. Burns advised citizens who have no home dial telephone, or who have only a manual instrument, to look about their neighborhoods for police alarm boxes. They can use these in any emergency to get in contact with the nearest police station. When the alarm box telephone is lifted a light shows on the station house switchboard and a police operator answers.

The police seemed certain that they could maintain their direct telephone and teletype service that runs out of headquarters to the various commands—station houses, emergency unit stations, etc.

For the information of subscribers, an AT&T employee defined the company's interpretation of "emergency calls" as follows: Calls concerned with fire, floods, wrecks, tornadoes, serious accident or serious illness, death, or any disaster or emergency requiring aid from the police department, the hospitals, a doctor, an ambulance, or a life-saving service; aid from militia, municipal, or other government authority; from utility companies in connection with power or pipe-line danger.

The person calling for an emergency falling in any of these categories need only tell the operator, "I want to place an emergency call."

* * * *

THE shutdown of FM broadcasting in the New York metropolitan area, involving all but a few independent stations, will last at least until the spring, it was predicted recently, as the large broadcasting systems made preparations to shift as soon as possible to the higher transmission bands required since January 1st by the Federal Communications Commission.

Other competent sources estimated it would take until the last quarter of this year or early in 1947 before high-powered transmission equipment of the type needed in a large metropolitan area will be available. This belief is strengthened by the recent strikes in two of the largest suppliers of electrical equipment, General Electric Company and Westinghouse Electric Manufacturing Company.

It was hinted in some quarters that technical considerations were not the only reason for the shutdown. The inference was that the large broadcasters were not overanxious to make the shift from standard broadcasting. While it would have been possible for the networks to have continued broadcasting past the first of the year on the low 42- to 50-megacycle band by applying to the FCC for an extension, they preferred to shut down in late October for the shift to the 88- to 108-megacycle band. Meanwhile, some of the independent and experimental stations have continued operating on the low band. It was indicated that they hoped to continue on the low band as the higher frequency is installed and tested.

From the FCC in Washington it was learned that most of the New York stations now operating had requested extensions and that these had been granted. The extensions allowed some of them to continue until January 30th and others only until January 15th. However, no station will be ruled off the air for failure to change bands until equipment is in better supply, it was said.

* * * *

THE recent strike of New York Western Union employees brought serious disruption to business and banking circles, paralyzing 85 per cent of the company's traffic. The company said service in the city was about 15 per cent normal, but the CIO American Communications Association, which called the strike in a wage dispute, said the percentage was even less.

Business reported its operations seriously delayed by breakdown of interoffice teletype systems, which could not be repaired by maintenance men who are among striking Western Union employees.

Paul Porter, chairman of the Federal Communications Commission, said no action would be taken on a union demand for an investigation of the company sending messages by mail until he had received the protest in writing from Victor Rabinowitz, counsel for American Communications Association.

Financial News and Comment

By OWEN ELY

Is House Heating by Electricity Feasible?

WHILE the question of the practicability of house heating by electricity may not properly come under the heading of "financial news and comment," the huge growth possibilities for electric revenues if this field could be opened up would naturally interest stockholders in the utility companies. While this department cannot attempt any technical survey, it may be of interest to sketch some recent ideas on the subject.

In the first place, our wartime experience with fuel shortages and heating inconveniences might well make the average householder, particularly during a prosperous period, willing to disregard the economic factor to some extent if he can obtain a flexible, fast-operating, and convenient heating medium through electricity. The room heater has these advantages. It isn't necessary to start or stoke the furnace, the heat is forthcoming almost immediately, and it can be directed (with plug-in equipment) to any desired section of the room or house. While such heat is costly as compared with furnace heat, waste is avoided since it can be turned off when no longer needed. We are likely to see more electric heaters installed in bathroom or bedroom walls of new homes, and the new portable device with a built-in fan to circulate the hot air, now being advertised, may also prove popular. There are also portable hot water radiators, heated by electricity.

However, the outlook for central house heating by electricity remains dubious. Electricity later may be used in air-conditioning systems, for automatic heating in winter and cooling in summer, in southern climates—but the principal unit now being developed along these lines (Servel's) is gas fired; and so far as the writer is aware, there is no combination type year-round air-conditioning device being developed for entirely electrical usage.

CENTRAL house heating by electricity has long been regarded by the engineering profession as impracticable. During the past decade only about 30 per cent of our total electric utility construction expenditures have been for production plant, while 70 per cent was for transmission, distribution, and general plant. Distribution to residences, with their average low consumption, is naturally very expensive. Hence while coal can be burned more efficiently by the utility company than by the householder, it costs several times as much to turn the heat into electricity, bring it to the house, and have it reconverted into heat. In 1944 it cost Consolidated Edison only about 6 mills in operating costs to produce a kilowatt hour, but a residential user had to pay between eight and nine times this amount for his average consumption, because of the heavy cost for transmission, taxes, maintenance and depreciation, fixed charges, etc.

Electric house heating would obviously be feasible only under present conditions in areas where electric rates are very low and where the character of the climate permits irregular rather than continuous heating. Oregon and Washington, where the climate is relatively mild and rates extremely low, is one of the most promising areas for any experiments with house heating. With the

huge amount of surplus power available from Bonneville (formerly used for the production of aluminum and other war materials) government officials have been interested in conducting house-heating experiments. The city of Portland is fairly near Bonneville, and Portland General Electric is now getting about two-thirds of its power from that source (compared with less than one-third before the war). The average residential rate in 1944 dropped to 1.74 cents. (Commercial and industrial customers paid only .78 cents.) This company is, therefore, in perhaps the best position of any in the country to try out electric house heating, since its rates reflect the subsidized Bonneville power.

ABOUT 200 homes were being heated entirely by electricity in 1944 (not all with central heating). The 1944 report stated "hundreds of people have inquired about the possibility of obtaining electric heating for homes they plan to build or modernize after the war. Such large volume sales of electricity will make possible even lower rates, and lower rates, in turn, will tend to increase consumption." As of July, 1945, however, the company did not appear to have instituted any special house-heating rates; the rate for residential use in excess of 225 kilowatt hours per month was 7 mills for the next 900, after which it advanced to 1 cent.

President Polhemus has written us:

> Although the customer satisfaction has been extremely good under the present residential rate, which results in a cost for heating alone of about one cent per kilowatt hour, it is not known how far the company can go with respect to reducing rates in the future with any reasonable degree of expected house-heating saturation. In order to have a representative number of homes electrically heated, the company has in most instances waived for experimental purposes a restriction in the rate schedules whereby the total connected load of residential space heaters is limited to six kilowatts. In the houses selected for the tests, kilowatt hour meters and recording demand meters will be installed on the total load and the house-heating load separately. From the data obtained from these meters it will be possible to determine the diversified demand of the house-heating load as compared to the other residential service at such critical times as the system peak, the coldest day, and the day which determines the maximum firm power purchased from the Bonneville Power Administration in the computation of computed demand. These data, together with the investment and expense in providing and operating the necessary transmission and distribution facilities, appear to be principal factors required for the formulation of a compensatory house-heating rate.

In Seattle, which is more distant from Bonneville, Puget Sound Power & Light (which competes with the municipality in supplying electricity to the city), residential rates average about the same as in Portland, the cost after the first 200 kilowatt hours being 7.5 mills, and after the next 2,300, 9 mills. A new public power district has been proposed to buy out the company, presumably to help bring in more Bonneville-Grand Coulee surplus power. Apparently the company has not yet experimented much with house heating. However, its gas competitor, Seattle Gas, is actively seeking this business. (During the war it had to reject a large number of applications for installations.) An interoffice memo prepared by Chief Engineer John Shaw for President Gellert on June 14, 1945 (filed as SEC staff exhibit 30), gave some interesting data on the relative cost of central heating of homes by gas and electricity in Seattle. Mr. Shaw's conclusion was that for the average small home (applying the 7-mill electric rate rather than the 9-mill) electricity would cost 72 per cent more than gas, using an electro-thermal off-peak storage system. Allowing for the greater installation cost for electricity, however, the cost of the latter might be 122 per cent higher. Mr. Shaw concludes "that in Seattle the electric utilities, both private and public, are not interested in the job of central space heating for homes. The increase in rate block from .7 cents to .9 cents for all over 2,500 kilowatt hours is designed to prevent addition of loads above this figure in domestic areas in Seattle."

HOWEVER, despite the obvious difficulties of getting electric costs

down to a practicable level to compete with other forms of house heating, popular writers continue optimistic on the subject. *Collier's* last year published two articles on this subject. ("Heat from Cold," February 17th, and "Push-button Heat," April 7th). The first of these stories stressed the application of reverse-cycle refrigeration, "by which more than a score of office buildings all over the United States are today being cooled *and heated* the year round." The heat is obtained without burning any fuel by taking cold air from outdoors and extracting heat from it. (At zero, air is only about 14 per cent cooler than at 70 degrees, on the absolute scale.) The trick is done by a small compressor circulating a refrigerant through pipe coils. In cold weather, however, it is more economical to use ground water, the temperature of which is uniform (in a good-sized well) the year round. The authors admit, however, that "although you get three-to-five heat units from nature free for every one you buy in electricity, the cost is high in places where power rates are up." However, they contend that the heat pump can compete economically with the fuel-burning furnace with electric rates at 2 cents per kilowatt hour, while a 1-cent rate would permit the pump to compete with coal around $10 a ton or oil at 5 cents a gallon. "It is likely that wide adoption of reverse-cycle heating will provide such an attractive volume of business that public utilities will quote these figures after the war." However, the present hitch seems to be that, while the system is used both in Europe and this country, installation costs are still too high (around $2,000 for a 10-room house).

THE second story ("Push-button Heat") stresses the possibilities of radiant heating, used by the Romans two thousand years ago.* There are said to be over 1,000 installations already in the United States, in houses ranging from $3,000 to $30,000, in churches, factories, etc. This method is to warm the surfaces of a room, preferably the floor, using concealed pipes with water just hot enough to maintain a temperature of 80 degrees, "which is pleasant on your feet." The radiation from the floor is absorbed by objects in the room, including persons, although the air temperature may be considerably lower. This system might also be adapted to cooling in the summer, and the system is largely automatic with oil and gas burners, while the coal people are also developing thermostatic control. Whether this system could be hitched up with reverse-cycle refrigeration was not indicated, but it would seem to be a possibility.

With present methods of house heating, electricity obviously can't be used except in a very limited way in some favorable spot such as Portland. If and when the new methods of house heating described above are perfected and used on a mass basis, however, electricity may have a better chance.

*

Prospectuses Should Contain Pro Forma Figures

THE offering prospectus is supposed to be the "Bible" containing all material and relevant data pertaining to a security offering, and theoretically no other information is supposed to be given to the buyer of the securities. Whenever other information is compiled, such as the so-called "comparison sheets," the name of the firm preparing it is frequently omitted and a hedge clause may be appended stating that it must not be "construed as an offer to sell or the solicitation of an offer to buy these securities." However, as previously pointed out in this department, many prospectuses omit essential averages and ratios (such as interest coverage or preferred dividend coverage), presumably because the lawyers and accountants take a narrow view as to what may be legally and properly included. In a few cases, however, these ratios and per share figures have been included, and constitute the most essential part of the

* See also story in January 21st issue of *Life*, pages 77-8.

prospectus for the informed investor, since they furnish yardsticks for comparison with similar issues. This is particularly true at the present time, when yields have dropped to record low levels and a small difference in the decimal figure of a ratio may determine whether or not the issue is attractive.

Of course it is always possible for the investor to work out his own ratios, if necessary—though as a practical matter the average buyer probably relies on informal advice from his bankers. But in any event the prospectuses should contain the proper basic data for making the computations. This is not always the case. While the the earnings summary in the front of the prospectus usually contains an interim 12-month statement, this is not always on a *pro forma* basis to include the latest changes.

To cite a recent example, the Potomac Edison Company in its recent preferred stock prospectus reported gross income for the twelve months ending September 30, 1945, of $3,595,051, and total deductions from income of $2,493,194. However, in the U-1 report (and in the commission's order) a *pro forma* statement for the same period was presented, showing gross income of about $1,837,000 (approximately half the figure as stated in the prospectus) and deductions from income totaling about $635,000. This was the correct setup which investors would naturally use in studying the earnings coverage for the preferred dividend. Customarily such coverage means the number of times fixed charges and preferred dividend requirements are contained in gross income. (The old-fashioned ratio is no longer much used in investment circles.)

OBVIOUSLY, the prospectus figures are of little practical value as stated in the front of the prospectus. The main distortion was caused by including in fixed charges an item of $1,737,580 for special charge-offs of debt discount, etc. (an offset to tax savings). The item should properly have been placed next to the tax item itself, under expenses. Minor discrepancies resulted from the fact that operations of certain properties purchased during the year were only included in the prospectus statement for part of the year; fixed charges and amortization were somewhat higher than the *pro forma* figures, and a subsidiary's preferred dividend requirements were included, although the issue was being retired. A careless investor, using the prospectus figures without any adjustment, would (assuming a $3.70 per dividend rate) arrive at a coverage of only about 1.32, which would make the stock appear to be an inferior issue. If he used the *pro forma* statement, having access to the U-1 statement, coverage would work out around 2.10—a vastly different showing.

It may be noted that in this instance even the *pro forma* statement was not on an entirely realistic basis. Originally last April the company planned to issue a 4½ per cent preferred, to be exchanged for the old stocks. Apparently due to delays in obtaining SEC approval for a managed exchange offer, the deal was later revamped as a competitive "standby" underwriting. This also moved a little slowly, or the management was too conservative, for the *pro forma* figures included allowance for a 4.20 per cent dividend rate, whereas the issue was actually awarded on a 3.60 per cent dividend rate. Any comparison with recent offerings of like character would have clearly indicated that the *pro forma* dividend rate was too high.

A MINOR criticism is that the earnings summary in the front of the prospectus almost invariably shows Federal taxes as a single item, while investors are particularly interested in the amount of excess profits taxes (as distinct from the normal and surtax item). It is true that the detail can usually be obtained from a more detailed income statement to be found in the back of the prospectus, or in a footnote thereto (as in the Potomac Edison Case) but there is no reason why this important information should not appear in the summary, particularly now that the excess profits tax has been eliminated.

Natural Gas Stocks

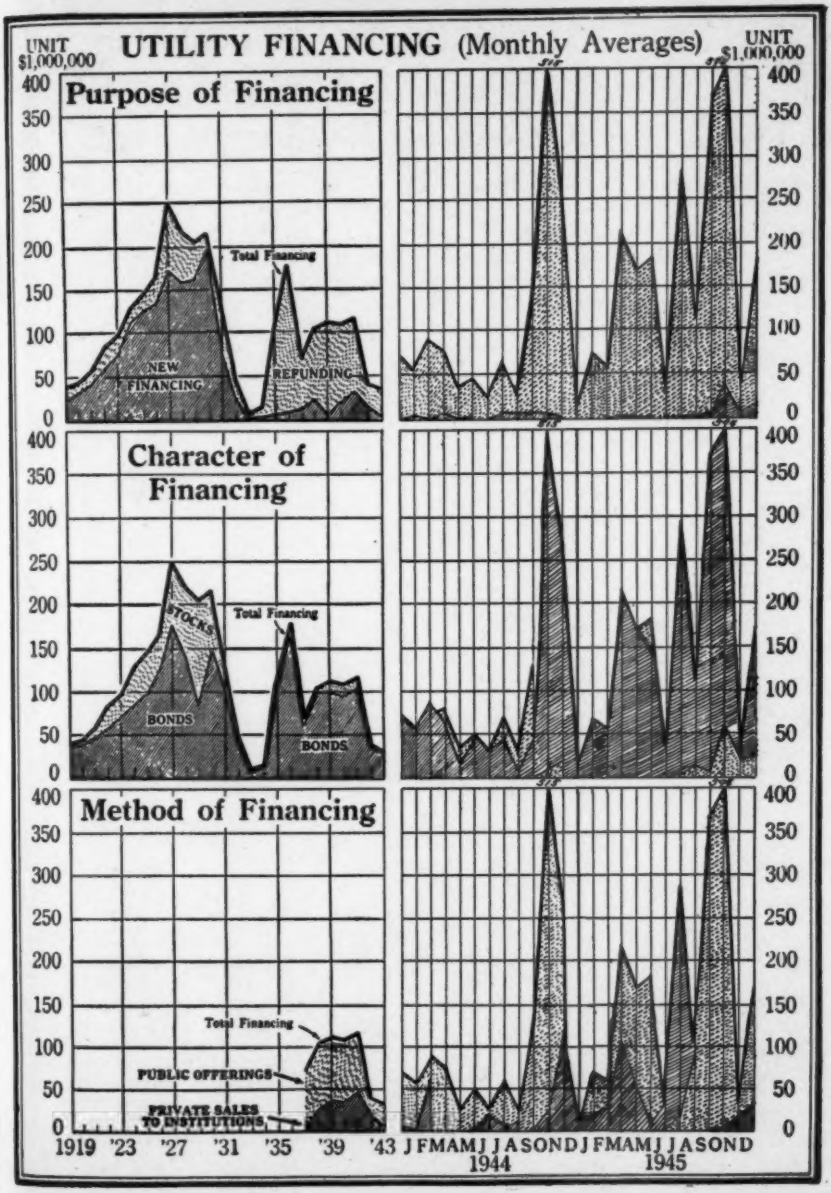
TEN over-the-counter stocks and one Curb issue have been added to our list of natural gas stocks. (Last published in the November 8th FORTNIGHTLY.) Some of these issues have poor markets but addition of the data will give a more rounded picture of the entire group. In using the averages, however, allowance must be made for irregularities in some of the individual issues. The high price-earnings ratio for Mission Oil, for example, appears due to the omission of certain equity earnings. In the yield column several of the figures are well below average, and one (Missouri Kansas Pipe Line) is far above average; omitting these exceptional cases the average yield would be 4.8 per cent.

Most issues in the group have gone along with the advancing stock market. Some of the best percentage gains (as compared with prices in the November table) appear to have been in Oklahoma Natural Gas, Lone Star, Pacific Lighting, Mobile Gas, Peoples Gas, El Paso, Northern Natural Gas, Panhandle Eastern, and Arkansas Natural A.

NATURAL GAS AND MIXED GAS UTILITY COMPANIES

	Where Traded	Price About	Earnings 12 Mos.	Earnings Amt.	Price-Earn. Ratio	Div. 1945	Yield About	Range 1945-46
Retail Natural Gas†								
Oklahoma Nat. Gas	C	43	Oct.	$3.56	12.1	$2.00	4.7%	45-29
Mission Oil	O	27	Dec. '44	.80	33.8	.85	3.2	18-11
Consolidated Nat. Gas	S	44	Sept.	2.87	15.4	2.00	4.6	45-31
Consol. Gas Util.	O	10	July	.91	11.0	.30	3.0	10-6
National Fuel Gas	C	15	Dec. '44	.81(c)	18.5	.80	5.3	15-11
Kansas-Neb. Nat. Gas	O	15	Mar.	1.12	13.4	.40(b)	2.7	—
Lone Star Gas	C	19	Sept.	.92	20.7	.70	3.7	20-11
Arkansas Nat. Gas	C	7	Dec. '44	.29	24.2	—	—	8-4
Pacific Lighting	S	62	Sept.	3.13	19.8	3.00	4.9	63-48
Houston Nat. Gas	O	37	July	2.95	12.6	1.60	4.3	38-27
American Lt. & Traction	C	25	Sept.	1.56	16.0	1.20	4.8	27-18
West Ohio Gas	O	7	Sept.	.39	18.0	.10	1.4	—
Montana-Dakota Util.	C	12	Sept.	.95	12.8	.60	5.0	13-10
Southwest Nat. Gas	O	5	Sept.	.30	16.7	—	—	5-1
Mobile Gas Service	O	22	Sept.	2.47	8.9	1.00	4.6	—
Southern Union Gas	O	24	Dec.	1.25E	19.2	.25	1.0	24-9
United Gas	C	16	Sept.	.92	17.4	.65	4.1	16-10
Rockland Gas	O	27	Dec. '44	2.08	13.0	1.64#	6.1	—
Retail Mixed Gas†								
Peoples Gas	S	95	Sept.	5.55	17.2	4.00	4.2	97-69
National G. & E.	O	7	Sept.	1.27	5.5	.30	4.3	7-5
Washington Gas Light	S	30	Oct.	2.22	13.5	1.50	5.0	32-24
Laclede Gas Light	S	7	Dec. '44	.38*	18.4	.40**	5.7	8-5
Wholesale and Pipe Line†								
El Paso Nat. Gas	S	54	Oct.	3.34	16.2	2.40	4.5	55-34
Interstate Nat. Gas	O	42	Dec. '44	2.39	18.3	2.10	5.0	41-32
So. Natural Gas	S	25	Sept.	1.93	13.0	1.25	5.0	25-17
Northern Nat. Gas	C	46	Sept.	3.99	11.6	2.50	5.4	48-35
Panhandle Eastern Pipe Line	S	39	Sept.	3.32	11.8	2.00(a)	5.1	40-25
Missouri Kansas Pipe Line A	O	17	Dec. '44	.66	25.7	1.60††	9.4	18-11
Memphis Nat. Gas	C	9	Dec. '44	.38	23.7	.25	2.8	13-4
Averages					16.5		4.5%	

S—New York Stock Exchange. C—Curb Exchange. O—Over counter. *After adjustment for additional maintenance required by bond indenture. **Indicated by initial dividend of 10 cents. †These classifications are not always exact—United Gas and Arkansas Natural Gas are both retail and wholesale, for example. ††Payments irregular. #Initial dividend of 42½ cents a share paid November 15, 1945, on new stock; regular rate estimated. E—Estimated on basis of first half. (a) Indicated rate on new stock. (b) Also stock dividend (1 share for 6 held). (c) In the ten months ended October, 1945, 60 cents was earned *versus* 63 cents in 1944.


UTILITY FINANCING (Monthly Averages)
UNIT $1,000,000
UNIT $1,000,000
Purpose of Financing
Total Financing
NEW FINANCING
REFUNDING
Character of Financing
STOCKS
BONDS
Total Financing
BONDS
Method of Financing
Total Financing
PUBLIC OFFERINGS
PRIVATE SALES TO INSTITUTIONS
400
350
300
250
200
150
100
50
0
1919 '23 '27 '31 '35 '39 '43
J F M A M J J A S O N D J F M A M J J A S O N D
1944
1945

What Others Think

Public Relations and Selling Confront Utility Companies

MATTERS of much import to the electric utility industry were discussed at the December meeting of the Southeastern Electric Exchange in Atlanta, Georgia. Among the papers presented were two which touched especially upon the public relations and sales problems facing business-managed utility companies in the coming months.

The general sales manager of Mississippi Power & Light Company, Les M. Taylor, talked upon "Molding Our Own Destiny," and the subject addressed by Charles A. Collier, vice president in charge of sales, Georgia Power Company, was "Selling Is the Answer." Both these speakers, in forthright words, urged the need of adopting aggressive policies on these matters, if free enterprise is to be maintained in this country.

Mr. Taylor made this opening observation:

> . . . [The] time has come when all of us connected with the electric industry must face certain facts squarely. Only by facing these facts squarely, and searching diligently and earnestly for their solution, can we of the electric industry be of maximum service to those we serve. . . . the future holds both a challenge and an opportunity for us.
>
> In the first place, our traditional economic system of free enterprise is facing a critical period; indeed, the most critical period in the entire history of America. At this moment, the United States of America is an island in a stormy sea of world socialism. When the people of Great Britain took a "left turn" recently, spurning the proved, conservative leadership of Churchill for the siren song of Atlee's socialism, she left us alone, the last great power on earth operating under the banner of private initiative and free enterprise.
>
> . . . and even in this country there is a strong and marked trend toward socialism, backed by small but vociferous minorities that plug for government ownership and control all along the line.
>
> The halls of our national Congress echo daily with cries for government control and subsidy, with demands for more Tennessee Valley authorities, new Missouri Valley authorities, etc. . . . In this day of world uneasiness, it is not too unexpected that people are less concerned with individual liberties than with personal security. . . .
>
> Advocates of government ownership—bureaucrats, politicians, and socialists, as well as "parlor pinks," have done a good job of installing doubt in the public mind as to the worth of free enterprise.

Turning then to the other side of the situation, the speaker said:

> While our enemies have done a good selling job, we cannot point with too much pride to what we have done in the utility industry along the lines of customer relations and meeting the propaganda we have had to combat. Time and time again public opinion surveys have indicated that most of the unfavorable attitude towards continued business management of industry can be traced to a lack of knowledge of the facts. Time and time again, individual cases have illustrated the public attitude changes when the people are given the facts. . . .
>
> *We must find out public opinion and follow it, like a certain southern Senator.*
>
> "Senator," said his henchman, "some of your constituents are disagreeing with you."
>
> "Well, keep close tab on them," instructed the Senator, "and when enough of the voters disagree with me, enough to make a majority, I'll turn around and agree with THEM." . . .
>
> Business management is in a preferred position in knowing the facts concerning the public benefits derived from the American system of freedom of enterprise. It is management's responsibility to present the facts in such a way that the people can understand and realize those benefits.
>
> We have the know-how. We have the facilities. We have the media through which to disseminate this information. What are we going to do about it? Too often the utility has hidden its light under a bushel and has not taken credit for a good job well done. Too often we have neglected the human equation.

DWELLING further on the "human equation," Mr. Taylor referred to a book, "One Nation for Sale," by Bert

Johnson, which he said brings out this point in striking fashion. He quoted these passages from this little book:

> The "masses" or the "have-nots" are Joe America! He it is who makes up the ranks of labor, labor in its longest, widest, and deepest implications. He is a factory worker; he is a warehouseman; he is a truck driver, a fireman, a policeman, a bellboy, a waiter . . . the average income of Joe America, in normal times, is about $30 a week. It is important to remember the things it will and will not buy.
>
> It of course does not buy books of the month, no golf memberships, no entertaining at the Ritz, no tickets for the Yale-Harvard game. But it is Joe America who makes up the prodigious buying power of the United States, and, therefore, the industrial and economic power. *It is Joe America who is the voting power and, therefore, the ruling power.* . . .
>
> So it is that Joe America is quite a guy. He is all things to this nation of ours, the man who built it, the father of the kids who crowd its playgrounds, the supporter of its institutions, and the backbone of its Army and Navy . . . to those whose job it is to mold public opinion through advertising, through selling, and through campaigning. Joe America is, first and foremost, The Market. Joe is the man whom we must KNOW, must UNDERSTAND. It is HIS opinion, not OUR opinion, not the BOARD OF DIRECTORS' opinion, that we must court and win.
>
> Why is it, then, that all over these United States, so many businessmen plan advertising campaigns, devise selling schemes, compose political speeches which meet only with their own approval and the approval of their own associates in the oak-paneled offices, at the businessmen's luncheons, at the golf and country clubs? You have read these ads, heard these speeches on this or that political issue, and seen these selling messages. . . .

Then, reminding his audience that the "Joe America's" referred to by Author Johnson are the same masses that those engaged in the utility business must sell. Mr. Taylor made this pertinent comment:

> . . . This group represents public opinion, and public opinion is the master switch, especially in a democracy. It is the principal power that governs all of our economic life. It is up to us, therefore, to make a close and careful study of Joe America, and devise more human, down-to-earth methods of selling America's free enterprise system to convince Joe America that it is to his personal advantage to maintain our traditional way of life. This is the same Joe America we are going to have to sell on the fact that the private electric industry can serve him better. . . .
>
> We in the utility business cannot hope to have these people request information regarding our business and the benefits of free enterprise system. The story must be carried to them uninvited and so presented that it will win an automatic reading by those we wish to reach and hope to influence. Truths must be simply presented beginning in "kindergarten doses," gradually unfolding to readers the story of the American system and the part that the private electric industry plays in this American system of free enterprise. . . .
>
> You and I know that the public power boys only did one thing, and that was step in and take credit for what we have accomplished in this industry, and they did it through the matter of publicity.

As to the selling that must be done, the speaker had this to say:

> We have a great opportunity today in the electric private utility business to properly select the personnel to do this tremendous job ahead. I need not remind you that a necessary step in the solution of our problem is a sound policy of good employee relations. . . .
>
> As to the job of selecting the sales manpower, the selection of salesmen becomes paramount because salesmen produce revenue and customer relations.
>
> . . . We must have good leadership and supervision. The guesswork must be taken out of market research.
>
> We must know what our customers think and plan our sales promotion and advertising in accordance. And may I again remind you that advertising and promotion must be designed to reach Joe America and not the selected few.

REFERRING to rural electrification, Mr. Taylor stressed the importance of working closely with the farmer customer, that not only should the utilities help to put more money in the farmer's pockets, but they must be sure that the utilities get the credit for doing the job. He said:

> . . . Not only must we bring electricity to those people not now receiving it; we must help assist in raising the economic levels of the farm customers by more agricultural processing, better marketing, and better farming.

And he added:

> Another great challenge that faces us to-

day is that of bringing about increased industrial development of the territory we serve, thereby securing new payrolls for the South.

Also, this passing reference was made to the influence upon the future of possible development of atomic energy:

> And now, lastly, let us consider the new age into which we are entering, rightfully called The Atomic Age. None of us can see into the future, yet each of us knows that within the next few years entirely new concepts and standards of living will come about. Just as America's scientific minds have developed the most effective and deadly weapons known to mankind, likewise will these same minds develop new conveniences and new aids to better living.
>
> Here again business-managed electric utilities have a matchless opportunity for real service. You know and I know that electricity is the key to all of life's good things, and our industry will be closely linked with the development of tomorrow's better living standards. Figuratively speaking, we are stepping up to plate, with the eyes of America's millions watching us, and we can either strike out or hit a home run. And . . . let me remind you that the American public likes to see home runs, but doesn't care much for strike outs.

And, in closing, Mr. Taylor emphasized the responsibility upon each individual to work to maintain our system of free enterprise:

> It is ironical, yet true, that we have just finished one war, and are now entering into another war—the battle for survival. We couldn't lose the last war, but we *can* lose this one, and we may, unless we pitch in and fight the rising tide of socialism to a finish.
>
> We can lose this war unless YOU, *unless each of us, look upon the battle for the preservation of America's system of private enterprise as our own individual responsibility.*
>
> There is not a minute to lose in this war for the preservation of free enterprise, not a minute too soon to pitch in and help turn the tide against national socialism . . . not a minute too soon to do everything within our power, NOW, to save our time-tested system of individual merit and business-managed enterprise.

In approaching his subject, "Selling Is the Answer," Mr. Collier listed *destructive competition* as first among the fundamental questions to which, in his opinion, it is the answer. He said that the fear of destructive competition through the construction and operation of unnecessary and undesirable public power projects, is "your No. 1 fear." He added:

> Can you meet that threat with salesmanship? In my judgment, you cannot meet it in any other way. You can use all the paper and ink in America, and can write all the articles you want against such competition; you can give all the testimony on earth about it, but all will be wholly ineffective unless this industry does a complete, across-the-board selling job. For, after all, the determination as to whether you are going to face destructive competition is in the hands of John Q. Public. It is not a question of whether this or that Left Winger wants to install this or that "authority" — that doesn't determine it; it is not a question of whether this or that Senator or Congressman wants to make himself solid with his constituents that determines the answer; it is not the fact that maybe a river is running wastefully to the sea that determines it. The answer is determined, in the final analysis, by the rank and file of the American people, with particular reference to the people in the area proposed for the development. So why not sell those people on the principle that your company, not public power, is what they want?
>
> What makes for low rates? Volume use? Selling! You cannot, under the profit system, achieve low rates and volume use in any other way. You cannot achieve a low cost for the service and you cannot give full value of benefits of the service, except through selling.

With respect to public power projects, the speaker expressed the view that

> The alleged absence of low rates, of volume use, and full utilization of the service, has furnished the springboard for all, or nearly all, of the agitation for government construction and operation of electric systems. Yet broad application of the principles of salesmanship over the years would have forestalled the claim that public ownership was the only road to low rates, volume use, and full access to the benefits of electric service.

As to other questions to which "selling is the answer," Mr. Collier mentioned *prosperity for the industry,* the *obtaining and holding of public approval,* and *discharging the debt of the industry to society.* As to the latter he stated:

> . . . [I] hold the theory that no business or individual who takes its or his livelihood out of a community and never puts anything back is serving his own best interest. As an example of what I mean, suppose you have

WHAT OTHERS THINK

"I CAME, MRS. DONIZETTI, TO ASK YOU THE $12.64 QUESTION!"

a community from which your gross revenue is $100,000 per annum. Do you owe any debt to that community for the $100,000? I contend that you do. You have got to pay that debt by putting more back into that community than the bare-bone service you furnish; you have got to put back into it all the things that true salesmanship produces, looking toward the time when the things you put back will be converted into a greater era of prosperity and well-being for the people of that community and, incidentally, yourself—all of this over and above and beyond the mere kilowatt hours which you may have delivered and sold.

In short, it was the opinion of Mr. Collier, in considering the question of the survival of the electric industry as private enterprise, that it

may well depend upon the application of real salesmanship throughout this industry, not only in the selling of our goods but, along with it, the value of the service to the people in every community, seeing to it that our business is so conducted that there will be no attempt or urge on the part of any sensible man or woman to substitute some Federal bureaucracy in lieu of the business you . . . represent. We must quarrel more with ourselves and less with parts of our uninformed public when we let agitation for public ownership arise. Did you ever think that it does arise because, over the last couple of decades, we have not done as complete, full, and efficient a job of selling our services to the American public as the American public thinks we should have done?

We can have the low rates, we can have the good will that government ownership claims—we can have all of that, and all the good things that private enterprise contributes in addition—IF we will but build the volume of business that our companies are capable of doing, upon a basis of quality, service, low cost, and thoughtful consideration for our customers, and make our proper

contribution to the social and economic welfare of the communities we serve; and, if you do not do it on that basis, all the paper—as I said before—and all the ink, and all the appearances before committees of the Congress are going to have no more effect upon the final result than pouring water on a duck's back.

There is much food for thought in the remarks of these two men. If their addresses, in the confident and forward-looking attitude expressed, are characteristic of the views of leaders in the utility industry as to the outlook for the business-managed companies in the field of public service, it indicates a will-to-do, which should prove a great asset to that business in the coming months.

—R. S. C.

Sponsors Outline Provisions of CVA Bill

SENATOR Hugh B. Mitchell and Representative Henry M. Jackson, authors of companion bills (S 1716 and HR 5083) to establish a Columbia Valley Authority, recently issued a joint statement outlining the major provisions of these measures. The bills, which are awaiting hearings before the Senate Commerce Committee and the House Rivers and Harbors Committee, were drafted to meet objections to previous measures sponsored by Senator Mitchell and others, the statement declared.

The new companion bills call for a 3-man supervisory board, patterned after the Tennessee Valley Authority. The CVA would be empowered to generate and distribute hydroelectric power, irrigate arid lands, improve navigation facilities, prevent floods, conserve soil, and protect forests and wild life. The bills also contain provisions for the safeguarding of states' rights and local sovereignty, the sponsors said.

The statement continued:

> The bills provide for a sound and orderly development of the vast resources of the Columbia river region. They will undertake that development on a unified basis rather than under the piecemeal arrangements now prevailing. Today, no less than 11 Federal government agencies have to do with Columbia river problems. This legislation will place the problem in the hands of one single agency, an agency empowered to do a thorough job.

Local sovereignty would be ensured, it is added, by establishing CVA headquarters directly in the Pacific Northwest, with the directors living in the region. "This means," the sponsors said, "that important decisions will be made at home rather than in Washington, D. C., 3,000 miles away on the other side of the continent."

As in the case of TVA, the CVA's board of three administrators would be required to prepare plans for the unified development of the Columbia valley through integrated control and use of waters of the region. These plans would be presented in the form of recommendations to the President and to the Congress. The joint statement described the necessity for an integrated program in the following language:

> Congress must soon adopt some kind of a policy regarding the widely scattered functions in the Columbia valley. There is much confusion. The handling of power facilities alone is on a confused basis with different agencies operating the dams. The Federal government must adopt a definite policy in regard to this region, its power, and other resources.
>
> We have to have strong leadership out there, someone who can take hold of the situation and carry out an action program—some agency which can furnish leadership. Congress must help to fit our democracy into the needs of the people of the Pacific Northwest through an agency which can make democracy work. This cannot be done through a multitude of bureaus which cannot move until Washington, D. C., tells them what to do.

The proposed legislation incorporates existing reclamation laws to govern the further development of irrigation projects.

Columbia Basin Settlement Studies Issued by Reclamation Bureau

A SERIES of reports is being published by the Bureau of Reclamation of the Department of the Interior, to "help smooth the way" for the settlement of the 1,000,000 acres of land to be brought under irrigation in the Columbia basin near the Grand Coulee dam.

The joint investigations covered in the first report were conducted by the Reclamation Bureau, the Washington State College and Agricultural Experiment Station, the U. S. Department of Agriculture, and Northwest Regional Planning Commission.

This 300-page book, "Types of Farming," contains extensive studies upon crop and livestock production, also detailed information as to types of farm economy suited to the Columbia basin—both during the development period and at the mature stage of development. Numerous charts, tables, and maps supplement the text.

Additional reports on rural recreational areas, ensuring proper land use, and other subjects, are to be issued. Copies of these reports may be obtained from the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.

Household Appliances in Postwar Economy

IN a 70-page "Survey of Urban Housing," replete with charts, tables, and illustrations, the Curtis Publishing Company (*The Saturday Evening Post, The Ladies Home Journal,* and *Country Gentleman*) presents a comprehensive study of the importance of housing and household appliances to the postwar economy.

Among other extensive detail pertinent to many phases of the question, the table reproduced below should be of especial interest to business-managed electric utilities.

Those interested in this survey should address the Curtis Publishing Company, Independence Square, Philadelphia 5, Pennsylvania.

REPLACEMENT MARKET FOR HOUSEHOLD APPLIANCES

Type of Appliance	*Present Owners Who Will Replace* %	*Median Age of Appliance to Be Replaced* *Yrs.*	*Total Expected Market* *Replacements* %	*New Customers* %
Radio: with phonograph	9.6	4	12.9	87.1
Radio: without phonograph	15.3	8	91.7	8.3
Washing machine: regular	13.5	12	49.4	50.6
Washing machine: automatic	8.7	9	4.6	95.4
Refrigerator	19.4	10	59.7	40.3
Vacuum cleaner	15.9	12	53.3	46.7
Cooking range	17.1	12	61.7	38.3
Iron	15.0	9	89.7	10.3
Toaster	12.8	8	63.2	36.8
Food mixer	5.1	8	10.9	89.1
Home freezer	10.2	*	1.2	98.8
Ironer	3.8	12	4.1	95.9
Dishwasher	13.7	*	4.3	95.7

*No age given.

The March of Events

TVA Reports

THE Tennessee Valley Authority on December 31st reported that in the fiscal year 1945 it produced more electric power than any other integrated system in the United States.

"The War Department revealed that the ability of TVA to supply abundant electric power was the major factor in locating one of the largest atomic energy plants at Oak Ridge, Tennessee," the report said.

TVA power was distributed by 130 municipal and coöperative systems to approximately 600,000 customers. Power revenues exceeded $39,000,000 and net income was nearly $18,000,000, about 27 per cent higher than the year before. About three-quarters of the power output went to war purposes.

The twelfth annual report to the President and Congress said the end of the war "means less a shift in direction than a change in pace so far as the long-term objectives of resources development are concerned. While TVA mustered its entire energies and facilities to help win the war, its activities, more often than not, complemented the peacetime aims of river control and agricultural, forest, and industrial development basic to building a stronger valley," the report said.

Two major dams, Kentucky and Fontana, were placed in operation, bringing to 26 the number in the integrated system to control the flow of the Tennessee.

The report said TVA employees declined in number during the year from 21,000 to 12,350.

Reorganization Plan Approved

THE Securities and Exchange Commission on January 14th conditionally approved the second amended alternative plan for the reorganization of the Portland Electric Power Company, filed by the independent trustees of the company.

The commission had before it five plans filed by the trustees and by Guaranty Trust Company of New York, indenture trustee. In approving the trustee's second amended alternative plan, the commission based its findings as to fairness and equity upon its own valuation of the assets of the debtor holding company.

The SEC placed a value of $31,000,000 on the common stock of Portland General Electric Company, the holding company's major subsidiary; a value of $6,500,000 on the assets of Portland Traction Company, another subsidiary; and $1,000,000 on the interurban properties directly owned by the parent company.

The plan approved conditionally differs from the other plans in that it proposes dissolution of the parent company. Under its provisions, Portland General would pay a dividend of $725,000 to Portland Electric and would receive certain assets with a value of $195,000.

Tideland Oil Fight

CALIFORNIA'S fight to retain ownership of its tidelands—there is oil underneath the water—goes into its second legislative round February 5th before the Senate Judiciary Committee. Attorney General R. W. Kenny is expected to lead the fight for California. Opposed to him will be Secretary of Interior Harold L. Ickes, who expects to appear personally before the committee.

Ickes, worried because he believes the known oil reserves of the United States will last only eighteen years, wants the tidelands put under Federal jurisdiction.

The House has already passed legislation surrendering any Federal claim to the tidelands.

President Truman has proclaimed United States jurisdiction over the mineral deposits of the continental shelf outside the 3-mile limit to the point where the ocean depth drops to more than 600 feet. The presidential proclamation establishes United States jurisdiction from an international standpoint and has no effect on the Federal-state ownership issue.

Attorney General Clark has filed in the Supreme Court a suit against the state of California, claiming Federal ownership of submerged land in the marginal sea extending from low-water mark to the 3-mile limit.

Although some proponents contend that the Supreme Court has ruled repeatedly on the ownership issue in favor of the states, the government contends that there never has been a ruling on ownership of lands between low-water mark and the 3-mile limit.

The National Association of Attorneys General adopted, at their meeting in Jacksonville, Florida, November 28th, a resolution calling

upon the Senate for passage of the legislation. The pending legislation would surrender to the states title to submerged and tidal lands "within their boundaries."

The board of directors of the Louisana Association of Commerce this month voted to support the state's fight to block the Federal government's claim to ownership of California's oil-producing tidal lands.

AGA Elections

ALVIN H. STACK, president of the Tampa Electric Company has been elected a director of the American Gas Association, succeeding Hudson W. Reed, president of the Philadelphia Gas Works Company, who has been elected vice president of the association, it was announced recently by Everett J. Boothby, president.

Other elections include that of James A. Brown, vice president of the Commonwealth & Southern Corporation, to the chairmanship of the finance and control committee; that of Clifford E. Paige, president and chairman of the Brooklyn Union Gas Company, to the chairmanship of the Charles A. Munroe Award Committee; and that of R. H. Hargrove to the chairmanship of the Beal Medal Award Committee.

Project Planning Director Appointed

JOHN W. DIXON'S appointment as director of the branch of project planning in the Bureau of Reclamation was announced early this month by Secretary of the Interior Harold L. Ickes. Mr. Dixon had been acting director of the branch since October 11, 1945.

In commenting on the appointment which he recommended to Secretary Ickes, Commissioner of Reclamation Michael W. Straus said:

"Mr. Dixon's education and his extensive engineering experience in the Federal service thoroughly qualify him to head up the important branch of project planning, which is responsible for the programming of investigations in the western states in relation to existing and proposed reclamation projects, legislation, compacts, and other legal instruments."

The branch is responsible for the coördination of the various basin and sub-basin reports for the development of western rivers, as conducted by the Bureau of Reclamation and coöperatively by the bureau and other Federal and state agencies. This branch is responsible for developing reports that are adequate in scope for action by Congress.

California

Higher Car Fare

SPECIAL tickets selling three rides on the San Francisco municipal railway for 25 cents were placed on sale in business establishments through the city in advance of January 20th, when the car fare raise became effective.

James H. Turner, utilities manager, announced early last month that he would ask business firms to assist in the public distribution of the tickets to facilitate operations under the increased fare.

The basic 8½-cent fare was approved December 31st by the board of supervisors. A 10-cent cash fare will be charged "casual" riders on the railway.

Turner estimated that 85 per cent of the railway's patrons would use the tickets. The higher fare is expected to raise additional income of $9,300 a day, which will be earmarked for purchase of new equipment in the railway's modernization program.

Seven board members opposed the fare raise, one less than the two-thirds majority required to reject a fare increase.

Bias Bill Introduced

A FIGHT in the special "reconversion" session of California's legislature over antirace discrimination was forecast on January 8th with the introduction of a bill providing for a Fair Employment Practices Act for California identical with New York's law.

Governor Earl Warren has recommended the passage of a strong act, but legislators said that the measure introduced by Assemblyman A. F. Hawkins faced strong opposition. A Fair Employment Practices Bill was defeated at the last session.

The governor based his latest plea for passage of such a measure partly upon California's position as "a cosmopolitan state" where "the United Nations Charter was born."

Connecticut

Commission Approves Merger

THE state public utilities commission recently announced its approval of the petition of the Litchfield Electric Light & Power Company to consolidate with the Connecticut Light & Power Company on January 1st. The Litchfield Company is operated as a part of CL&P.

The approval by the commission of the Litchfield Company's petition resulted in the substitution of the Connecticut Light & Power Company's rates throughout the entire area served by the Litchfield Company. This substitution of CL&P rates will effect an annual saving of approximately $50,000 for the customers of the Litchfield Company.

District of Columbia

Agrees to Pay Rise

IN a surprise reversal of plans, the Capital Transit Company recently announced that it would pay its 3,800 workers a 12-cent-an-hour increase awarded on January 2nd by an arbitration panel, effective January 13th.

Earlier, company officials had declared that they intended to withhold payment of the increase pending approval of the move by the Wage Stabilization Board. The company proposed using the WSB approval as a lever when it applied for an increase in local fare rates before the District Public Utilities Commission, officials said.

However, a company spokesman said that the company abandoned its plans after a "closer examination of WSB regulations." He indicated that the company would operate under the new wage setup for an "experience" period before applying for fare adjustments.

The wage boost is retroactive to November 9th and amounts to nearly $250,000. This back pay will be paid to men "sometime in February."

President Truman on January 7th directed the Office of Defense Transportation to return the Washington bus and trolley system to the Capital Transit Company at midnight of that day. The traction properties were seized by presidential order November 21st, following a strike of employees.

Georgia

Gas Rates Investigated

THE state public service commission on December 28th instituted an investigation of the natural gas rates of the Atlanta Gas Light Company. The show-cause order initiating the investigation stated that the company had been charging, to operating expenses, considerable sums for excess profits taxes. These taxes have been repealed, effective January 1st.

The order further recited that a parent company, Consolidated Electric Gas Company, is under an SEC directive to sell the common stock of the Atlanta Company and that the purchaser of such stock would gain more by the reductions in Federal taxes than would Consolidated. A hearing in this proceeding has been scheduled for February 14th.

The rates of Atlanta Gas Light Company were reduced twice during the war years, the last reduction, approximately $400,000 per year, having been made early in 1945.

A proposal of Consolidated to sell the Atlanta Gas Light Company stock to Southern Natural Gas Company was recently withdrawn when the Georgia commission interposed objections.

Indiana

OPA to Appeal Fare Ruling

THE Office of Price Administration recently appealed the January 4th decision of Judge Robert C. Baltzell denying its plea to cancel the recent fare increase of Indianapolis Railways, Inc.

The state public service commission on January 9th altered the trial fares to provide four tokens for 25 cents and a 10-cent straight cash fare. Crux of the argument is the OPA's insistence on a 7-cent cash fare because it maintains the higher rate is "inflationary," as Harry R. Booth, OPA attorney from Washington, charged in the commission hearing early this month.

The OPA seeks to have the original transit rates restored.

It was disclosed that the utility regards it only a matter of time before the decline in the number of people riding the streetcars, trolleys, and busses, and the rise in wages and other costs—"two pincers engulfing us"—will mean that it will be seeking another fare increase.

The earlier hearing also revealed that the utility had been asked for a 30 per cent wage increase by two AFL unions, Division 1,070 of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America and the International Brotherhood of Electrical Workers, Local B-1,393.

Kentucky

Tax Suits Dismissed

For a consideration of $20,000, to be paid to the city by the Louisville Gas & Electric Company, the city has dismissed three old tax suit cases against the company and final papers were filed in circuit court recently. A controversy has developed about what effect on city revenues the cases would have had if they had been carried through the courts and won.

Phil Millet, secretary of the sinking fund, who with Millard Cox as special counsel for the city developed the large bulk of material on utility taxation for Mayor Neville Miller, and who has followed LG&E litigation since, said:

"This involves from $2,500,000 to $3,000,000 of other people's money. While there is still a case pending in Franklin Circuit Court at Frankfort which, if won, will be controlling on all the years named in two of these suits dismissed, the city kicks all this possible money out the window. It's too big a thing to be kicked around like that."

Law Director Richard H. Hill and Lewis C. Carroll, of the department, disputed Millett's theory that the tax suit now pending before the Franklin Circuit Court is related to the old cases which date back to 1934, and that the city could get any money from the utility company on the dismissed cases even if the Franklin case was won.

Gas Franchise Approved

The newly elected Lebanon city council at its first meeting on January 8th approved the sale of a franchise providing piping of natural gas into Lebanon. The sale was requested by the Kentucky Gas Distributing Company.

The company proposes to tap the 24-inch Texas-East coast gas line, which passes through Marion county, and to supply fuel for 7 towns in addition to Lebanon.

Michigan

Fare Raise Stands

Efforts of the CIO failed to block an increase in fares on Detroit's municipally owned transportation system on December 31st, when Judge Clyde D. Webster refused in circuit court to issue a temporary injunction.

The fare increases, ordered recently by the street railway commission and effective at midnight December 31st, mean a straight 10-cent fare on streetcars and busses, with transfers free. The fare has been 6 cents on all streetcars and some bus lines, and transfers 1 cent extra.

R. J. Thomas, president of the United Automobile Workers, led a delegation to the city hall to protest to the common council. The council refused to hear him, saying that it had no control over fares. Later, Judge Webster refused to grant a restraining order asked by the UAW, but issued an order to show cause why an injunction should not be issued. It was made returnable January 11th.

Despite apparent acceptance of the new 10-cent DSR fare by the public, the Office of Price Administration on January 2nd formally demanded that the system produce records and qualified witnesses to justify the increase.

Richard A. Sullivan, acting general manager of the DSR, announced immediately that he would comply with the demand only on instructions from Mayor Jeffries and the DSR Commission. Jeffries had expressed opposition to OPA intervention. The mayor suddenly reversed his defiance and on January 4th turned over all books and records of the railway to representatives of OPA, headed by Special Financial Consultant Fred W. Kleinman, an official of the Illinois Commerce Commission.

To Pay Refund

Customers of the Detroit Edison Company will receive refunds of $16,450,000 on their 1944 and 1945 bills, to be distributed during this year, under terms of a decree signed recently by Circuit Judge Archie D. McDonald.

The decree was opposed unsuccessfully by James H. Lee, assistant corporation counsel of Detroit, who argued that the refund should be at least $3,750,000 greater because of "improper" charges to operating expense.

The decree also calls for a $3,000,000 rate cut for 1946. Refunds are estimated at slightly more than an average bill for a 2-month period. The $16,450,000 was impounded following an order of the state public service commission directing the company to reduce its income on the basis of excess tax liability.

To carry out the refunding operations, the court appointed as trustee, George C. Dean of Hastings. The plan of refund is to be submitted to the commission and other interested parties for approval. It was estimated that it will cost $320,000 to make the refund and about six months to complete.

It is believed that the refund is the largest ever made by an individual company in an individual state.

Minnesota

Natural Gas Vote Set

THE St. Paul city council early this month approved a resolution which will submit to the voters at the April 30th election the question of whether the city shall be supplied with natural gas.

The resolution was presented by W. A. Parranto, commissioner of public utilities, who pointed out that a petition was filed April 6, 1945, asking that such an election be held.

The natural gas question will be presented at a special election held at the same time as the city general election.

Parranto also pointed out that at the city primary election in March there will be submitted to the voters the Skelgas ordinance, designed to force the Skelgas plant to move.

Nebraska

District Approves Contract

THE proposed contract for the sale of hydro power by the Nebraska public power system to the city of Lincoln went a step further towards realization recently with the announcement by George E. Johnson, chairman of the board of managers of the public power system, that the contract has already been approved by one of the power districts, and would be signed by the remaining two districts and in the hands of city officials before the end of this month.

Johnson made his announcement at a meeting on January 10th between hydro officials, Mayor Lloyd Marti, and members of the city council.

The Central Nebraska Public Power and Irrigation District was the one approving the contract.

The contract then went to the Loup River Public Power District and to the Platte Valley District.

Negotiations to put through such a contract were begun December 7th, the day after Consumers Public Power District turned down the city's proposed lease plan.

Power Line Assured

CONSTRUCTION by the Central Nebraska (Tri-County) Public Power District of a new $700,000 southwestern Nebraska power line appeared assured recently, Senator Butler, Republican of Nebraska, said.

Butler said that with approval of an allotment of $369,000 in Federal funds, the remainder of the cost can be covered by a loan from the Rural Electrification Administration.

He said he was advised the new line would extend southward from Johnson to serve six or eight REA districts as part of its load, and ultimately connect at McCook with the Platte Valley Public Power District line extending southward from North Platte.

District Files Petition

THE Consumers Public Power District on January 3rd filed a mandamus petition in district court against the mayor, council, and other officials of the city of Grand Island, asking that they be required to collect November light bills which had been canceled as a Christmas present to customers of the city light department.

The suit is set for hearing February 4th before District Judge E. G. Kroger.

Consumers announced some time ago it would bring the suit. At that time the power district asserted cancellation of the bills was an act of "hostility" to negotiations toward transfer of its properties in Grand Island to the city. Mayor Harry S. Grimminger replied that the city for several years had canceled one month's bills annually and that no hostility was intended.

The petition was filed in the name of Charles Crawford, manager of the Consumers District in Grand Island.

New Jersey

Governor Favors Strike Ban

BEFORE the opening session of the state legislature on January 8th, Governor Walter E. Edge advocated measures to require compulsory arbitration of labor disputes that hamper distribution of living essentials.

Governor Edge placed labor-management controversies, with housing and postwar projects, at the top of a list of problems facing the state and the legislators.

Recalling the Boston police strike in 1919, he said it brought forth the principle that "there is no right to strike against the government, national, state, or local."

"I solemnly declare to you," he added, "that the time has come to accept the next principle. It is this: There is no right at any time to

strike against the security, welfare, and lives of the people—and heat, light, power, transportation, water, and food are the life essentials of the people.

"I see no reason why a properly constituted board of public utility arbitration could not establish a fair wage scale and working conditions for a public utility as easily as a public utility commission today can establish a fair rate to consumers. Therefore, I counsel those who are concerned that the state of New Jersey has the power and the authority to provide this type of insurance against hardship and privation for its citizens."

New York

Transit Crisis Put First

MAYOR O'Dwyer of New York city on January 6th made an indirect appeal to Governor Dewey and the state legislature for additional sources of revenue to enable the city to cope with an expected increase of at least $65,000,000 in running expenses for the year beginning July 1st. He also asked for the right to double the one per cent sales tax for the next three years, with the extra yield earmarked for a $211,000,000 rehabilitation job on the city's unified transit lines.

The mayor's appeal for increased sales tax was reported to have been approved by the governor.

New York city organizations that consistently have urged an increase in the subway fare preserved a united front in reacting to the mayor's proposal that the sales tax be increased. Virtually all argued that making up the subway deficit by increasing the sales tax imposed a burden on New York city residents for the benefit of commuters who, it was declared, would not pay the sales tax but would benefit from the constant rate of the subway fare.

Major General Charles P. Gross, new chairman of the city board of transportation, at his first press conference on January 8th, announced he plans to take the city out of the business of supplying power for its subway system and indicated that as an "individual" he would be willing to pay more for a subway ride if it meant getting better subways.

Gross revealed he had canceled a $390,000 contract between the board and the J. G. White Company, an engineering firm, for modernization of one of the city's three power plants. He said he had asked the Consolidated Edison Company eventually to take over the city's plants at 59th street, 74th street, and in Williamsburgh, paying the city a fair price to cover improvements recently made.

"I believe the city should get out of the power business," declared Gross. "Like other railroads, we should limit our job to transportation. . . . The $106,000,000 project for power rehabilitation asked by the former administration would not produce power more cheaply than we could get it from another utility."

Gross said the board would go ahead with a $14,000,000 modernization project for the 59th street plant, as a temporary measure for the city to get the necessary power until Consolidated Edison can move in and take over.

At present, Consolidated supplies the power for the independent system, while city-owned plants supply the power for the IRT and BMT.

Rhode Island

Power Bill Introduced

A BILL which would authorize cities and towns to acquire, own, and operate municipal electric light plants appeared again in the state house of representatives this month.

For the third consecutive year it was introduced by Eugene Lanctot, Democrat of Woonsocket. It was referred to the committee on corporations.

Utah

Protests FPHA Rate Cut

PROTESTS of the reduction of electric power rates ordered into effect in apartments operated by the Federal Public Housing Authority in Lehi, which place them below other domestic rates, were filed last month with the Lehi city government.

The protests pointed out that renters, many of whom are not permanent residents, secure power at lower rates than home owners, thus placing the burden of operation costs and debt service of the municipal power plant directly on the home-owning class of people.

The reduction was made by the city council at the request of Clarence L. Beesley, Salt Lake City, and Paul C. Miner, Provo, representing the FPHA. These officials said Lehi's rates were in excess of comparative rates supplied by public utilities in similar areas.

The Latest Utility Rulings

Acts to Protect Ultimate Consumers after Reduction in Wholesale Rates

LOCAL distributing companies are not, according to the Michigan commission, entitled to the benefit of rate reductions for wholesale natural gas supply resulting from orders of the Federal Power Commission, but the ultimate consumers are the beneficiaries. Accordingly, the commission has ordered that the portion of funds impounded under a stay order of a Federal court during litigation over such a rate reduction order belongs to and constitutes the property of the eligible ultimate consumers receiving service from local companies.

This action resulted from a rate reduction in Detroit *v.* Panhandle Eastern Pipe Line Co. (1942) 45 PUR(NS) 203. The Panhandle Company transports gas from southern gas fields and sells it to Michigan utilities. The Federal commission order had been upheld by the Supreme Court in Panhandle Eastern Pipe Line Co. *v.* Federal Power Commission (1945) 58 PUR(NS) 100. A stay order granted during the litigation provided that impounded funds should be held for the benefit of ultimate consumers.

The state commission observed that the Supreme Court, in Central States Electric Co. *v.* Muscatine (1945) 57 PUR(NS) 81, had held that the United States Circuit Court of Appeals, in a similar case and under similar circumstances, did not possess jurisdiction to determine the ownership of funds impounded, and that the determination of the relative rights of the gas distributing companies and ultimate consumers should be made under state law.

Under and by virtue of the provisions of Act 3 of the Public Acts of 1939, the Michigan commission held that it had power and authority to hear and determine the question of ownership of the portion of impounded funds allocable to the distributing companies. It declared that the intent and purpose of Congress in enacting the Natural Gas Act was to protect ultimate consumers from excessive natural gas charges by natural gas companies engaged in the transportation and sale of natural gas in interstate commerce for resale.

The commission ordered that such portion of the impounded fund as was distributable to ultimate consumers should be distributed in accordance with such method and plan as the commission might by future orders determine to be just and reasonable. *Re Consumers Power Co. (D-2948); Re National Utilities Co. of Michigan (D-2448); Re Michigan Consolidated Gas Co. (D-3109); Re Battle Creek Gas Co. (D-3156).*

Holding Company Required to Furnish List Of Stockholders to Committee

A DECLARATION of a preferred stockholders' committee regarding solicitation of authorizations, in order to represent preferred stockholders of Northern States Power Company in opposition to an application for enforcement of a plan under § 11 of the Holding Company Act, was permitted to become ef-

fective. The Securities and Exchange Commission also held that examination of a list of preferred stockholders for the purpose of solicitation of authorizations was within the scope of § 15(g) of the act and necessary and appropriate in the public interest and for the protection of investors.

The commission went further and held that it had authority, which it should exercise, to require the holding company to deliver to the committee a list of preferred stockholders. The holding company contended that a list of stockholders is not a "record" within the meaning of § 15(g). The commission said it could not agree. The language "accounts, cost-accounting procedures, correspondence, memoranda, papers, books, and other records" was said to be all-inclusive.

Out of about 63,000 preferred stockholders the committee represented about 400. It pointed out that it did not have facilities for copying so large a list without incurring great expense. It stated that the company had available mechanical means and facilities for cheaply and efficiently addressing its large list of stockholders. The commission continued:

> . . . While the company management might, in voluntary coöperation with the committee, mail the committee's material upon the payment of the expenses thereof, we do not think it appropriate to impose such a requirement on the company. However, we think it clear from the record that it would be appropriate to require the company to furnish to the committee for its possession and use a complete and up-to-date list of preferred stockholders. We believe that we have the power to grant such relief as a condition of the withholding of our use of our own process to make the list available to the committee.

The commission said further that if it were specifically called on to exercise its powers under §§ 14 and 22(a) to make available a list of preferred stockholders on the basis of the set of facts presently before it, the commission would find the statutory standards completely satisfied. The same considerations of policy underlying its decision that, pursuant to §§ 15(g) and 20(a), the company should be required to permit the committee to inspect the stockholders' list would require the commission to find the statutory standards of §§ 14 and 22(a) fully met. It would not, however, be necessary to resort to powers under §§ 14 and 22 unless by the company's failure to act the commission would be required to do so. *Re Northern States Power Co. (File No. 68-41, Release No. 6244).*

Union Proposals on Group Riding and Other Taxicab Matters Considered

Taxicab Operators, Drivers, and Garage Employees Local Union No. 935 applied to the District of Columbia commission for a hearing with respect to proposed changes in zones, rates, and regulations pertaining to taxicabs. The commission considered each of the questions raised, although it had indicated to representatives of the union that the union is not a public utility and is not subject to regulation and control by the commission.

Under existing law, said the commission, there is no limitation on the number of taxicab licenses that may be issued in the District of Columbia. This is a matter that only Congress can pass upon.

The group-riding proposal provided that prevailing single passenger fares should continue to apply, and that the group fare of each passenger should be reduced 10 cents for each zone a passenger rides in group. This rather unusual proposal was illustrated as follows:

Pick-up

1 passenger at Walter Reed . 4th Zone
1 passenger at 16th & Upshur 3rd Zone
1 passenger at 16th &
Park road ..... 2nd Zone

2 passengers at 16th & T .... 1st Zone
Destination—Navy Department .. 1st Zone

The Fares

4th Zone passenger rode one zone alone and three zones in group. Therefore, he is entitled to 30¢ reduction from his single fare of 90¢ and his fare is 60¢.

All other passengers in this trip are riding the respective zones in group—so their fare is reduced:

10¢ in each zone, as follows:

3rd Zone to 1st Zone	40¢ each
2nd Zone to 1st Zone	30¢ each
1st Zone to 1st Zone	20¢ each

Existing rates had been determined with a great deal of study after full hearing. The commission had considered testimony as to investment, expenses of operation and maintenance, amount of so-called "dead time" and "dead mileage," and the value of the time of drivers. Group-riding rates had been based upon the single-passenger rate and were designed to provide a definite incentive to drivers to engage in group-riding operations. It was said to be obvious that in any zone system it is not possible to make the charge for each and every trip profitable just as it is not possible to fix a rate for each and every trip that would limit the return to just the amount that is fair for such trip. The commission continued:

> Rates prescribed by this commission must be so definite and certain that every person desiring to avail himself of taxicab service shall be able to tell for himself the correct charges he must pay. Therefore, a rate regulation must be so framed as to reduce the need for interpretation to a minimum and remove, so far as possible, any ground for misunderstanding. The rates proposed in the application filed by the union do not meet these requirements. To the contrary, the adoption of such rates would lead to endless confusion and argument.

The commission also denied a hearing on a proposed increase from $2.50 to $3 in the hourly rate and denied a hearing on a proposed increase from 10 cents for each full 5-minute period to 20 cents for each 5-minute period or fraction thereof in the rate for waiting time.

An application for hearing on a proposed increase from 10 cents to 25 cents in the charge for answering a telephone call for taxicab service was held for further consideration. *Re Taxicab Operators, Drivers, and Garage Employees Local Union No. 935 (Order No. 2984, PUC No. 2942, GD No. 1914).*

Police Request Is Sufficient Basis for Denying Telephone Service

A PETITION for restoration of telephone service, discontinued at the request of a police commissioner, was denied by the Massachusetts Department of Public Utilities on the ground that the action of the company was neither unjust nor unreasonable. It was pointed out that if the company should disregard such a request, it might well find itself subject to prosecution for participating in an illegal enterprise. A power company, it was noted, had been fined substantially for furnishing gas to illicit stills in United States *v.* Consumers Power Co. (US Dist Ct 1940).

Evidence had been presented which required a finding that the premises were used for the placing of bets on horse racing and numbers. The police had found slips relating to such bets. The telephone subscriber had been convicted for that offense. There was, however, no evidence of a single use of the telephone for any illegal purpose, and, as stated by the department, if it was to be found that the telephone was so used, such a finding would have to be based on an inference to be drawn from general knowledge that telephones are customarily used for these purposes in establishments where illegalities of this kind are practiced.

The department did not find it necessary to decide whether the telephone was used for the placing of bets. It conceived it to be its duty to order the company to restore service only if the refusal of the company to do so was unjust and

unreasonable. The department, it was said, cannot exercise its jurisdiction so as to interfere unreasonably with the rights of property of the telephone company or with its right of management beyond the reasonable limit of public control. The department continued:

> There is an obvious limitation on our power to act in this case. The right of an individual to telephone service is not absolute. It must yield to the greater considerations of law and order and other similar compelling considerations involving the public welfare. These considerations at once limit the right of an individual to receive, and qualify and modify the duty of the telephone company to furnish service.
>
> The police commissioner of Boston is a public officer charged with the vital responsibility for maintaining law and order and the prevention of crime in the city of Boston. As the responsible head of the police department, his official acts are entitled to the greatest weight.

The department, it was said further, possesses no jurisdiction over the acts of the police commissioner in the performance of his duty, nor does it have a right to review his actions. Its jurisdiction applies only to the telephone company. Its decision to be bound by the action of the police commissioner was not, however, to be regarded, even inferentially, as meaning that it would refuse to review the action of the company itself in discontinuing service to a subscriber. If the company of its own accord should take such action, the department would determine for itself whether or not the company were acting unjustly and unreasonably. *Rodman v. New England Telephone & Telegraph Co. (DPU 7322).*

A similar petition for restoration was denied where the police found racing sheets and racing information and other evidence of the use of premises for gambling purposes. On one occasion the police arrived when the occupant of the premises was using the telephone and hung up the receiver upon their arrival. *Carrozza v. New England Telephone & Telegraph Co. (DPU 7323).*

Redemption Premium Not Required When Debt Of Operating Subsidiary Is Reduced

THE decision of the Federal District Court in *Re* Laclede Gas Light Co. (1944) 58 PUR(NS) 414, approving a plan under § 11(e) of the Holding Company Act, involving bond retirement, has been sustained by the Federal Circuit Court of Appeals, Eighth Circuit. The appeal was by Massachusetts Mutual Life Insurance Company, a creditor of the subsidiary, Laclede Gas Light Company. The question presented was whether callable bonds, not due, of a public utility corporation, not a holding company, in reorganization under the act, may be retired without paying such premiums.

It was conceded that retirement of bonds issued by a holding company, with or without premium redemption provisions, is within the power of the commission.

The court thought the reasoning in cases approving that rule was applicable to an operating utility. Retirement, it was said, was not due to any voluntary act on the part of the subsidiary but was due to the compulsion of the act. Retirement without paying the premium was held not to be repugnant to the statutory requirement that the plan must be "fair and equitable to the persons affected by such plan."

Whether, upon retirement of outstanding bonds in the reorganization of an operating subsidiary, payment of principal, accrued interest, and redemption premiums is the equitable equivalent of the bondholders' rights would depend upon the facts of any particular case. The proper measure of such equivalence, said the court, is for the determination of the commission in the first instance, and its expert skill in appraising the facts must be accorded due weight by the court. Since there was a "rational basis" in fact for the finding of the com-

mission and no "clear-cut" error of law by either commission or court, the appellate court was not inclined to disturb the conclusion.

The provision of § 11(b)(2) in reference to the distribution of voting power among the security holders of a company which is not a holding company states, according to the court, a condition precedent only to the power of the commission to order a change in the corporate structure of such company. It is not relevant to the question of the fairness or equity of retiring bonds without paying the redemption premium. *Massachusetts Mutual Life Insurance Co. v. Securities and Exchange Commission et al. 151 F2d 424.*

Other Important Rulings

THE United States Supreme Court held that the Interstate Commerce Commission acted within its discretionary power to permit the proposed common carrier transportation of motor vehicles by water if it "is or will be required by the present or future public convenience or necessity," where it based such authorization upon the inadequacy of earlier service which had been discontinued during the war, the likely requirements for the future, and the inability of the existing carrier to effect an expeditious resumption of service at the war's end. *United States et al. v. Detroit & Cleveland Navigation Co. et al. (No. 22).*

The New York Supreme Court, Appellate Division, affirmed the judgment in favor of a municipal housing authority in 58 PUR(NS) 40, where it was held that a municipal housing project consisting of residence apartments, constructed in accordance with a state policy, was a public building entitled to be served with electricity at the rate charged to a municipality for public buildings, the appellate court stating that the test was whether the purpose of the use was in furtherance of a public benefit. *Staten Island Edison Corp. v. New York City Housing Authority et al. 58 NY Supp2d 427.*

The Federal Circuit Court of Appeals held that a railroad is required to transport persons in the custody of police officers under a warrant valid on its face, that a common carrier refusing to accept such persons for transportation is liable for a penalty, and that employees of a railroad company are not required to constitute themselves a court of law in order to determine whether extradition proceedings were validly conducted before accepting as a passenger for transportation a person subject to extradition held upon a warrant valid on its face. *Picking et al. v. Pennsylvania Railroad Co. 151 F2d 240.*

The absence of a determination by the commission that certain carrier operations constituted passenger stage operations requiring a certificate does not preclude a court, in a criminal prosecution against the carrier for such operation without a certificate, from determining whether such operations constituted a violation of the Public Utilities Act requiring a certificate for passenger stage operation between fixed terminals, according to a decision of the appellate department of the superior court of California. *People v. Stolzoff, 162 P2d 743.*

An applicant for authority to operate a call and demand motor carrier service directly in competition with common carrier service must, according to the Colorado commission, make a clear showing that sufficient business exists to justify the additional service. *Re Schaefer (Application No. 7107-PP, Decision No. 25180).*

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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VOLUME 61 PUR(NS) NUMBER 3

Points of Special Interest

Titles and Index

TITLES

INDEX

SECURITIES AND EXCHANGE COMMISSION

Re American Power & Light Company

File Nos. 70-618, 54-100, Release Nos. 6176, 6201, 6258
October 31, 1945; November 8, 1945; November 30, 1945

APPLICATION *under § 11(e) of the Holding Company Act for approval of plan for retirement of debentures; approval withheld pending suggested amendment of plan. Plan approved as amended November 8, 1945; plan as further amended approved November 30, 1945.*

Corporations, § 15.1 — Dissolution — Securities retirement plan — Participation by security holders — Holding company regulation.

1. Fair and equitable treatment of security holders upon retirement of securities under § 11(e) of the Holding Company Act, 15 USCA § 79k (e), requires that the security holders should receive the equitable equivalent of the rights surrendered, in the order of their priority, from that which is available for the satisfaction of their claims, p. 134.

Security issues, § 5.1 — Redemption premium — Holding company simplification.

2. Bondholders of a holding company are not entitled to a call premium, as such, upon the retirement of the company's indebtedness because of the compulsion of § 11(b) of the Holding Company Act, 15 USCA § 79k (b), since such a retirement cannot be considered voluntary or at the option of the company, p. 134.

Security issues, § 5.1 — Retirement of debentures — Prepayment rights.

3. Not all prepayments of debt pursuant to a retirement plan under § 11 (e) of the Holding Company Act, 15 USCA § 79k(e) need be at the face amount of the debt claim, regardless of the contract rights of the particular debentures and regardless of the risks involved, p. 135.

Valuation, § 20 — Value of securities — Right to receive interest.

4. The principal determinant of values of securities having a distant maturity date is the right to receive interest rather than the amount of the principal claim, for the purpose of determining a fair redemption price upon prepayment caused by § 11 of the Holding Company Act, 15 USCA § 79k, p. 135.

Intercorporate relations, § 19.3 — Holding company simplification — Fairness of plan.

5. Section 11 of the Holding Company Act, 15 USCA § 79k, was intended to bring about the integration and simplification of holding company systems without destruction or diversion to others of any legitimate investment interest in the existing structure, and the "fair and equitable" standard of § 11(e) of the act must be applied with this end in mind, p. 135.

Corporations, § 15.1 — Dissolution of holding company — Participation by security holders.

6. The present investment worth of a debenture should be the measure of its participation in a plan providing for winding up of a holding company under § 11(e) of the Holding Company Act, 15 USCA § 79k(e), particularly where the contract is wholly silent as to the amount which debentures should receive upon prepayment caused by § 11 of the act, p. 135.

Security issues, § 5.1 — Retirement of debentures — Redemption price.

7. An automatic rule of 100 (par amount) in all debt retirement cases under § 11 of the Holding Company Act would produce inequitable results, and, therefore, it is necessary to inquire into the circumstances of a particular case to determine whether payment of 100 upon retirement is fair and equitable, p. 135.

Security issues, § 5.1 — Redemption price — Factors considered.

8. Interest rate, maturity date, and risk factors incident to a particular security which is to be prepaid bear upon the fairness of the proposed discharge of the security under § 11 of the Holding Company Act, 15 USCA § 79k, p. 135.

Corporations, § 15.1 — Holding company dissolution — Fairness of plan.

9. The fair and equitable standards of § 11(e) of the Holding Company Act, 15 USCA § 79k(e), require the Commission, in passing upon a debenture retirement plan in connection with a holding company dissolution program, to consider the treatment of all security holders in the light of their existing status and their present rights apart from the operation of § 11 of the Holding Company Act, and to determine whether the debenture holders are receiving a fair equivalent of their rights, p. 135.

Valuation, § 16 — Value of debentures — Measures of value.

10. In assaying the investment worth of a holding company's debentures, a factor of prime significance is that the holding company holds, and has held for some time, substantial amounts of cash items and debt securities of its subsidiaries, p. 142.

Valuation, § 20 — Value of securities — Earning power as factor.

11. In determining the worth of a holding company's debentures, it is necessary to consider the earning power of the holding company's assets, including both the debt securities and the common stocks of its subsidiaries, p. 144.

Security issues, § 5.1 — Debenture retirement — Fairness of price.

12. A plan under § 11(e) of the Holding Company Act, 15 USCA § 79k (e) providing for payment of principal amount of debentures, whose retirement is caused by § 11, is unfair and inequitable to persons affected thereby, where the value of the debentures substantially exceeds such principal amount, p. 149.

Security issues, § 5.1 — Debenture retirement — Retirement price.

Statement, in dissenting opinion, that debt plus accrued interest is the measure of a creditor's claim, and that upon retirement of debentures under § 11(e) of the Holding Company Act, 15 USCA § 79k(e), a cash payment in that amount satisfies the debt and affords creditors full compensatory treatment, p. 151.

RE AMERICAN POWER & LIGHT CO.

Corporations, § 15.1 — Holding company dissolution — Participation by creditors.
Statement, in dissenting opinion, that the principle of "equitable equivalent" is irrelevant where debenture holders are to be paid off in cash upon the retirement of such debentures pursuant to holding company dissolution under § 11 of the Holding Company Act, 15 USCA § 79k, p. 152.

(CAFFREY, Commissioner, concurs in result; HEALY, Commissioner, dissents.)

APPEARANCES: Root, Clark, Buckner and Ballantine, by Joseph Schreiber, for American Power & Light Company; Waldo C. Hodgdon, for John Hancock Mutual Life Insurance Company; Barnes, Dechert, Price and Smith, by Henry C. Place, for Girard Trust Company; Emanuel J. Freiberg and Maurice C. Kaplan, for the Public Utilities Division of the Commission.

By the COMMISSION: American Power & Light Company ("American"),[1] has filed an application under § 11(e) of the Public Utility Holding Company Act of 1935 seeking approval of a plan for the retirement of American's outstanding 6 per cent gold debenture bonds, due 2016, and Southwestern Power & Light Company's ("Southwestern") 6 per cent gold debenture bonds, due 2022, assumed by American, at 100 per cent of principal amount plus accrued interest. After the filing of the plan, American requested a further extension of its authorization to purchase the debenture bonds pursuant to an open-market purchase program which had been in force since February 22, 1943.[2] Such application was consolidated for the purpose of hearing with the § 11(e) filing described above.

A public hearing was held after appropriate notice. John Hancock Mutual Life Insurance Company ("John Hancock") owning at that time $1,000,000 principal amount of American's debentures[3] and Girard Trust Company ("Girard"), representing owners of $721,000 principal amount, participated in the proceedings and objected to the plan as unfair to the debenture holders.[4] Briefs were filed by American and John Hancock.[5] On the basis of the record we make the following findings:

Description of American

American, a Maine corporation, is one of the five principal subholding companies in the Electric Bond and Share System. Excluding inactive subsidiaries, American has eighteen subsidiaries of which thirteen are public utility companies as defined in the

[1] American and its parent, Electric Bond and Share Company, are registered holding companies.

[2] See Re American Power & Light Co. (1943) Holding Company Act Release No. 4133; Re American Power & Light Co. (1943) Holding Company Act Release No. 4483.

[3] Unless specifically distinguished, both American's and Southwestern's gold debenture bonds will be referred to as the "debentures" or "American's debentures."

[4] Representatives and holders of over $2,800,000 principal amount of American's debentures did not seek leave to be heard in the proceedings but stated similar objections in letters which were made part of the record of action of this case.

[5] Since the filing of its brief, John Hancock has advised us it no longer owns any of American's debentures, having sold the last of its holdings of such debentures on April 23, 1945.

act, furnishing electricity and gas to approximately 1,400 communities with an estimated population of 4,100,000 located in twelve scattered states. The subsidiaries of American have outstanding debt and preferred stocks in substantial amounts. While American owns almost all of the common stocks of the subsidiaries, it also owned $27,438,250 principal amount of their debt securities as at December 31, 1944.

American's own structure consists of $36,389,600 principal amount of debentures (described below) followed by two series of preferred stock having an aggregate stated value of $177,145,326 and 3,013,812 27/50 shares of common stock issued, of which 3,008,511 27/50 shares having a stated value of $37,434,351 are outstanding. Bond and Share owns 937,211 shares of 31.2 per cent of the common stock of American. As of December 31, 1944, the dividend arrearages on American's preferred stock totaled $60,455,507.

We have had occasion to review the structure of American and its status under § 11, and we have ordered that American should be liquidated and dissolved.[6]

Appendix A attached hereto [omitted herein] shows the various companies which comprise the American holding company system, the states in which they operate, the nature of their businesses, and the per cent of voting control held by American as of December, 31, 1944.

A corporate balance sheet as of December 31, 1944, and corporate statements of income for the period 1940–1944, inclusive, of American are shown as Appendices B and C [omitted herein]. A consolidated balance sheet as of December 31, 1944, and consolidated statements of income for the period 1940–1944, inclusive, of American and its subsidiaries appear as Appendices D and E [omitted herein]. Appendices F and G [omitted herein] show the outstanding debt securities and preferred stocks of American's subsidiaries. A list of American's investments in subsidiaries as of December 31, 1944, is set forth in Appendix H [omitted herein].

The Debentures

Between 1916 and 1926, American issued and sold $51,583,900 principal amount of its gold debenture bonds due in 2016[7] at varying prices. Prior to 1935, $5,773,400 principal amount of American's debentures were converted into common stock. Between January 1, 1935, and December 31, 1944, American reacquired by purchase $12,424,200 principal amount, leaving $33,386,300 principal amount presently outstanding. The debenture agreement provides that the American debentures may be redeemed on any interest date, but only if the entire issue is redeemed at 110 per cent of the principal amount and accrued interest,

[6] Re Electric Bond & Share Co. (1942) 11 SEC 1146, 46 PUR(NS) 321, Holding Company Act Release No. 3750; aff'd (1944) 53 PUR(NS) 16, 141 F2d 606; cert. granted (1945) —US —, 89 L ed —, 65 S Ct 1400.

[7] Debentures in the principal amount of $6,983,900 were sold in 1916 to American's stockholders with American realizing 90½ after deducting underwriting and financing commissions of 2½ per cent. Between 1923 and 1926, $43,000,000 principal amount of debentures were sold to the general public at prices ranging from 93½ to 98, with American realizing 87½ to 93½ after deducting underwriting and financing commissions. The balance of $1,600,000 principal amount was issued in part payment for securities of subsidiary companies.

and does not contain any other provisions relating to the rights of the debenture holders in the event of voluntary or involuntary liquidation absent default.

Between 1922 and 1925, Southwestern[8] issued and sold $5,000,000 principal amount of its gold debenture bonds, due 2022.[9] Since 1935, American has reacquired by purchase $1,996,700, leaving $3,003,300 principal amount presently outstanding. The debenture agreement under which Southwestern's debentures were issued provides that the debentures may be redeemed on any interest date after February 28, 1947, in whole or in blocks of not less than $1,000,000 at 110 per cent of the principal amount and accrued interest. The agreement under which the Southwestern debentures were issued does not contain any other provision relating to the rights of the debenture holders in the event of voluntary or involuntary liquidation absent default.

The Plan

In summary, the plan proposes the retirement of the debentures, at 100 per cent of principal amount, plus accrued interest to the retirement date which is described in the plan as the thirtieth day after the entry, on application of the Commission, of an order of an appropriate United States district court enforcing the terms and provisions of the plan. Interest on the debentures will cease to accrue on and after the retirement date. Upon surrender of the debentures to the trustees under the respective agreements underlying the debentures, such trustees will pay to the holders thereof the principal amount of such debentures, the accrued interest, and as agents for American, will deliver to such holders a nontransferable certificate which will entitle the holders to reinstate the debentures upon the payment of principal amount plus accrued interest from the last preceding semiannual interest date in the event that our order directing the dissolution of American should be held invalid by the Supreme Court of the United States.

The plan further provides that, in the event of any reinstatement of the debentures American will stipulate, if so required by us, that it will set aside in a separate fund the principal amount repaid to American upon any such reinstatement and will employ such fund only for the retirement of the debentures unless otherwise permitted by our order.

Applicable Statutory Standards

Before we can approve the proposed plan under § 11(e) of the act, we must find it necessary to effectuate the provisions of § 11(b) and fair and equitable to the persons affected thereby. In addition, we must find that the plan and related transactions satisfy other applicable provisions of the act.

[8] Southwestern was organized by Electric Bond and Share Company and American in 1912 as a medium through which various properties were conveyed to American's subsidiaries in Texas. In 1930 Southwestern conveyed all of its assets to American and American assumed all of Southwestern's liabilities including $5,000,000 principal amount of debentures then outstanding.

[9] Debentures in the principal amount of $3,000,000 were sold to the public in 1922 at a price of 89, with Southwestern realizing 81¼ after paying underwriting and financing commissions. An additional $2,000,000 principal amount was sold to the public in 1925 at 91½, with the company receiving 86¼ after deduction of underwriting and financing commissions.

A. *Necessity of the Plan*

As has already been noted, American is under order to dissolve. Compliance with this order obviously requires retirement of American's debt obligations, including retirement of the Southwestern debentures which are not callable until after February 28, 1947. We would therefore have no difficulty in finding that a fair and equitable plan for the retirement of American's debentures is necessary to carry out the terms of our dissolution order, and, in turn, to effectuate the provisions of § 11(b). We turn now to consider the fairness of the plan.

B. *Fairness of the Plan*

[1, 2] As has been noted § 11(e) also requires that the plan be "fair and equitable to the persons affected" by it. The persons who will be affected by the plan are the holders of American securities i. e., the holders of its debentures, $6 and $5 preferred stocks, and common stock. Our task in the present case is to ascertain whether the proposal to satisfy and discharge the debentures at 100 per cent of principal amount is fair and equitable to such security holders.

It is well settled that "fair and equitable" treatment requires that a security holder should receive, as stated by the Supreme Court in an opinion written by Mr. Justice Douglas ". . . in the order of his priority . . . from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered."[10]

The rights of the debenture holders are ascertained by reference to the contractual provisions in the indenture. The only indenture provision relating to prepayment of the debentures is the voluntary call provision which permits redemption "at the option of the company" at 110 per cent of principal amount.[11] We have consistently held that, where the retirement of indebtedness occurs because of the compulsion of § 11, the retirement cannot be considered voluntary or "at the option of the company" within the meaning of redemption premium provisions similar to those quoted above, and therefore that the bondholders are not entitled to the premium as such.

Re United Light & P. Co. (1942) 10 SEC 1215, 42 PUR(NS) 193, aff'd sub nom. New York Trust Co. v. Securities and Exchange Commission (1942) 46 PUR(NS) 270, 131 F(2d) 274, cert. den. (1943) 318 US 786, 87 L ed 1153, 63 S Ct 981, rehearing denied (1943) 319 US 781, 87 L ed 1725, 63 S Ct 1155. Re North American Light & P. Co. (1942) 11 SEC 820, Holding Company Act Release No. 3658, aff'd sub. nom. City National Bank & Trust Co. v. Securities and Exchange Commission (1943) 48 PUR(NS) 195, 134 F(2d) 65.[12] As we have said above,

[10] Group of Institutional Investors v. Chicago, M. St. P. & P. R. Co. (1943) 318 US 523, 565, 87 L ed 959, 63 S Ct 727, cited in Otis & Co. v. Securities and Exchange Commission (1945) 323 US 624, 639, 640, 89 L ed —, 57 PUR(NS) 65, 65 S Ct 483, as applicable to § 11(e).

[11] The Southwestern debentures are not callable until February 28, 1947.

[12] Accord: Re North Continent Utilities Corp. Holding Company Act Release No. 4686, Nov. 16, 1943; plan enforced in Re North Continent Utilities Corp. (1944) 54 PUR(NS) 401, 54 F Supp 527; Re Consolidated Electric & Gas Co. Holding Company Act Release No. 4900, Feb. 18, 1944; Plan enforced in Re Consolidated Electric & Gas Co. (1944) 56 PUR(NS) 417, 55 F Supp 211; Re Cities Service Power & Light Co. (1944) Holding Company Act Release No. 4944, 53 PUR(NS) 225; Re Laclede Gas Light Co. (1944) Holding Company Act Re-

the retirement of American's debentures is necessitated by the Commission's order under § 11(b) requiring American to dissolve. Consequently, the retirement of the debentures under § 11 does not constitute a call within the meaning of the voluntary redemption provisions, and the debentures are not entitled to receive the call premium as such.

The only significance of the call provision, therefore, upon a prepayment caused by § 11, is that it ordinarily provides a maximum figure for participation of the particular security, since the junior security holders have a right to retire such security at the call price quite apart from the impact of § 11.

[3–9] It will be observed that the conclusion that the voluntary redemption provisions are not applicable to the proposed retirement of American's debentures is a negative one, i. e., that the only provision in the indenture relating to prepayment is not by its terms applicable to a retirement caused by § 11. The pertinent rights of the debentures which should be satisfied under § 11(e) must, therefore, be ascertained by reference to the remaining provisions of the contract. These rights include the interest rate, the maturity date, and all the other provisions of the contract.[13] Determination of the "equitable equivalent of the rights surrendered" requires an analysis of the degree of certainty that the obligor will perform its commitments under the contract. Conscientious endeavor to give debenture holders the equivalent of what they surrender, in order to provide fair and equitable treatment for them, requires us to weigh their contract rights in light of the risks that the borrower will not duly and punctually live up to the contract. This involves examination of the assets and earning power of the obligor.

American contends, however, that there is a rule of law relieving us of the necessity of considering these factors, and requiring the payment of the face amount of debt claims which are prepaid under § 11, regardless of the contract rights of the particular debentures and regardless of the risks involved.[14]

We do not believe there is any such rule of law applicable to prepayments under § 11. It is our opinion, as we explain below, that the rule advocated by American would in some cases, including this one, involve a transfer of values from one class of securities

lease No. 5062, 56 PUR(NS) 321; enforced in Re Laclede Gas Light Co. (1944) 58 PUR (NS) 414, 57 F Supp 997; affd. (CCA 8th 1945) — F2d —; Re Central States Power & Light Corp. Holding Company Act Release No. 5351, Oct. 13, 1944; plan enforced in Re Central States Power & Light Corp. (1944) 58 PUR(NS) 439, 58 F Supp 877; Re Standard Gas & E. Co. (1944) Holding Company Act Release No. 5430, 57 PUR(NS) 321; plan not enforced on other grounds, Re Standard Gas & E. Co. (1945) 58 PUR(NS) 278, 59 F Supp 274; reversed (1945) 61 PUR (NS) 175, 151 F2d 326; Re Republic Service Corp. Holding Company Act Release No. 5731, April 16, 1945; plan enforced in Re Republic Service Corp. (DC Del 1944) — F Supp —; Re Consolidated Electric & Gas Co. Holding Company Act Release No. 5630, Feb. 23, 1945; plan enforced in Re Consolidated Electric & Gas Co.

[13] Contrast cases dealing with matured (or provable as if matured) debt claims in bankruptcy reorganizations, where the only right to be dealt with and accorded full priority is the right to receive the face amount of the debt claim. Under § 11, on the other hand, we are dealing with otherwise unmatured debt claims which often (as in the case of the American debentures here involved) have many years to run before maturity.

[14] American's second contention that, if the value of American's debentures is held to be an issue in this proceeding, the Commission should find that such value is not in excess of 100, is discussed *infra*.

to another and that this would produce unconscionable results which we could not find to be "fair and equitable," since the operation of § 11 was not intended by Congress to enrich any class of security holders at the expense of others.

The application of a mechanical rule that all prepayments of debt in § 11(e) plans must be at the face amount of the debt claim would operate capriciously and might produce a windfall for one class of security holders at the expense of another. For example, if American's debentures, with their maturity seventy-one years distant, bore a contract interest rate of 8 per cent whereas an interest rate of 4 per cent would be the current rate for comparable obligations and would adequately measure the debenture holders' risk, it would be highly detrimental to the value of the debenture holders' present rights if it were paid off at this time by retirement at 100. By hypothesis, the debenture would be worth 100 if the interest rate were only 4 per cent; the extra 4 per cent interest makes the debenture worth substantially more than 100 and payment at 100 deprives the debenture holder of the value of his right to receive the extra 4 per cent for each of the seventy-one years until maturity. The stockholder, by the same token, would be relieved of his disadvantageous contract which would require him for seventy-one years to pay 4 per cent extra interest each year than he would have to pay for funds currently raised by selling otherwise similar debentures. Payment at principal amount would thus deprive the debenture holder of substantial value, and transfer such value to the stockholders giving them a windfall.

The views expressed above are particularly applicable to securities, such as American's debentures, which have a distant maturity date. The principal determinant of values of such securities is the right to receive interest rather than the amount of the principal claim. Conversely, where the maturity of a debt security is near, the right to receive the principal amount of the debt becomes the dominant component of value and the right to interest becomes of lesser importance.[15] In the case of American's debentures, if a discount rate of 6 per cent is used, the right to receive the principal of $1,000 in the year 2016 has a current value of but $15; the balance of the claim of the debentures represent the right to interest for seventy-one years. Thus, American, in seeking to invoke its mechanical rule of 100, is, in essence, requesting us to disregard the right—the interest rate—which primarily determines the value of its debentures at the present time.

It is clear, therefore, that if we follow American's contentions, the carrying out of § 11 will result in substantial injustices to security holders. Such a result is contrary to the congressional intention manifest in § 11. We have held on numerous occasions that § 11 was intended to bring about the integration and simplification of

[15] As to the relative weight which we have given to comparable factors in determining the fair and equitable treatment of preferred stocks in plans which have come before us under § 11, see Re United Light & P. Co. (1943) 49 PUR(NS) 8, Holding Company Act Release No. 4215; aff'd sub nom. Otis & Co. v. Securities and Exchange Commission (1945) 323 US 624, 89 L ed —, 57 PUR(NS) 65, 65 S Ct 483; Re Virginia Pub. Service Co. (1943) Holding Company Act Release No. 4654; Re El Paso Electric Corp. (1945) Holding Company Act Release No. 5499.

holding company systems without destruction or diversion to others of any legitimate investment interests in the existing structure and that the "fair and equitable" standard of § 11(e) must be applied with this end in mind. In Otis & Co. v. Securities and Exchange Commission,[16] the Supreme Court upheld our conclusion that § 11 was not intended to accelerate maturities or to destroy existing investment values. In reaching this result, the court relied on the legislative history of § 11 of the act, as follows:

"When the President sent to Congress the report of the National Power Policy Committee which placed the suggestions of the Executive on holding companies before the legislative body, he said of the pending Public Utility Holding Company bill:

"Such a measure will not destroy legitimate business or wholesome and productive investment. It will not destroy a penny of actual value of those operating properties which holding companies now control and which holding company securities represent in so far as they have any value. On the contrary, it will surround the necessary reorganization of the holding company with safeguards which will in fact protect the investor.' S. Rep. No. 621, 74th Cong. 1st Sess. p. 2."

"That report urged the same care to investors:

"Simplification and reorganization of holding company structures, making possible within a reasonable period the practical elimination of the holding company, should be conducted under the Commission's supervision over a period of time to prevent undue losses to security holders from investment dislocations.' Id. p. 60."

The court thereupon held:

"Of course, Congress would wish, in simplifying a holding company system capital structure, to preserve values to investors, not to destroy them.[19]

[19] 'Such disposition as may be necessary can be accomplished by reorganization which will equitably redistribute securities among existing security holders.' S. Rep. No. 621, 74th Cong. 1st Sess. p. 16; H. Rep. No. 1318, 74th Cong. 1st Sess. pp. 49, 50."

Consequently, while giving the Commission power to compel the elimination of holding companies, deemed uneconomic, it allowed the affected companies to propose plans to the Commission to effectuate the objects and the Commission to approve such plans when they were considered 'fair and equitable.' . . .

"Enforcement of an overriding public policy should not have its effect visited on one class with a corresponding windfall to another class of security holders. . . .

". . . Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors. We must assume that Congress intended to exercise its power with the least possible harm to citizens."

The Otis Case establishes the principle that the present investment worth of a security should be the measure of its participation in a § 11(e) plan providing for winding up of the company. The dissenting justices urged that this violated the express stipulation of the parties as set forth in the charter

[16] (1945) 323 US 624, 89 L ed —, 57 PUR (NS) 65, 72, 65 S Ct 483.

provisions for an involuntary liquidation preference for the preferred stockholders, but the majority declined to treat as applicable a contractual provision adopted long prior to the act, since this would result in the statute operating to shift values from one class of securities to another contrary to the intent of Congress. In the case before us there is nothing in the contract resembling the liquidation preference of the preferred stockholders; since the voluntary call provision is not applicable, the contract is wholly silent as to the amount which the debentures should receive upon prepayment caused by § 11. American, therefore, in our opinion, does not have available to it the basis for the minority opinion in the Otis Case.

It is true that the Otis Case involved a determination of the rights of preferred stockholders vis à vis common stockholders but we believe the reasoning of the Supreme Court is also applicable to the rights of debtholders vis à vis security holders junior to them. In reorganizations under § 11 of the act, there is no more reason nor any more warrant in the legislative history of the act to treat debtholders' claims as matured than to mature the claims of preferred stockholders.[17]

American makes the contention that our decisions in the United Light & Power and North American Light & Power Cases, *supra* and the court decisions upholding them require the payment of principal amount in all cases where debt securities are retired because of § 11. Both those cases turned primarily on the question whether the call premium provisions in the contract between the company and the holders of its debentures were applicable to a retirement required by § 11. The Commission held in those cases, and on appeal its decision was affirmed, that a retirement of debentures compelled by § 11 was not the kind of optional calling by the company which brought the redemption

[17] Cf. Guaranty Trust Co. of New York v. Securities and Exchange Commission (1945) 61 PUR(NS) 175, 151 F2d 326, 330, where the court, although not faced with the specific issue now before us, said in respect of a plan under § 11(e) providing for a distribution in kind to debtholders:

"We have still to consider whether the power to distribute in kind applies to note and debenture holders as well as shareholders. The authority of Otis & Co. v. Securities and Exchange Commission (1945) 323 US 624, 89 L ed 511, 57 PUR(NS) 65, 65 S Ct 483, is acknowledged by all the parties, as it must be. But they draw a distinction between the technical position of a preferred shareholder and that of a debenture holder in an attempt to show the Otis Case inapplicable to the problem here. We think the argument rides that distinction too hard and that as applied to the present problem the distinction is one lacking in essential difference. Persons who put money into a corporate enterprise do not, of course, all stand on the same plane in regard to their rights and duties. The bondholder may have a specific lien on the corporate assets. The noteholders have no specific lien but they are entitled to have their money paid back to them before the shareholders divide what is left. Among shareholders, too, there may be distinctions of which preferred and common stock come most ready to the mind but which distinctions increase in number as other types of shares are created. But we do not see that the classifications of these investors in a corporate enterprise necessitates the drawing of lines so completely separated in categories as the security holders would have us draw here. A noteholder, after all, has only a claim to be paid from corporate assets after security holders with specific liens are paid. The preferred shareholder has to wait until the noteholder is paid for his money, but in the meantime he may have a voice in the management of the corporate enterprise. We do not think that the categories are so absolute that a decision saying what preferred shareholders may be forced to take in a reorganization under the Public Utility Holding Company Act is of no value in another case which concerns debenture holders instead of preferred shareholders."

premium provisions into operation. As a secondary argument, the debenture holders argued generally that, apart from the option provisions, the debenture holders were entitled to compensation for the termination of their investment. However, no attempt was made on behalf of the debenture holders or by counsel to our Public Utilities Division to relate such claimed compensation to the value of the debentures and to establish that the debenture holders' interests in the companies as continuing enterprises were worth more than the face amount of their claim. Moreover, in neither case, did the record affirmatively indicate that to discharge the debentures at their face amount, as proposed by the company, would be unfair to the debenture holders. It was under these circumstances, that the Commission held that the debenture holders were not entitled to compensation for the premature termination of their investment.

It is true that as to the United Light & Power Company debentures, the Commission approved the company's proposal to pay 100 in the case of two series of debentures of approximately the same maturity date but with interest rates of 6 per cent and 6½ per cent, respectively. However, even in the case of the 6½ per cent debentures, no facts were adduced to show, nor did the record indicate, that 100 was inadequate compensation. If payment of 100 was fair to the 6½ per cent debenture holders, the payment of 100 to the 6 per cent debentures would constitute somewhat more generous treatment than might be required if the reasoning of our present decision were applicable. However, there may be reasons why the face amount of a debt claim is the minimum amount which it may be accorded. This is a question which is not before us in this case, and is not decided herein.

The Commission does not regard these two earlier cases under § 11(e) as representing a complete answer to all cases dealing with prepayment of debt under § 11.[18] As a result of the experience gained through consideration of a large number of later cases, we are persuaded that an automatic rule of 100 in all debt retirement cases would produce inequitable results and that it is necessary to inquire into the circumstances of the particular case to determine whether the payment of 100 is fair and equitable. Consequently, in these later cases our opinions dealing with compulsory debt retirements under § 11 have emphasized such circumstances, not articulated in the earlier cases, as the interest rate, maturity date, and risk factors incident to the particular security which is to be prepaid as bearing upon the fairness of the proposed discharge of the security.[19]

[18] In the United Light Case itself ([1942] 10 SEC 1215, 42 PUR(NS) 193, 204), the Commission alluded to two cases where securities were retired at a premium, " . . . despite the fact that [the companies] may have been in the process of dissolving at the time . . . " and then distinguished such cases by saying that the fact that these companies were permitted to take such action when they desired to do so, " . . . cannot be taken as an indication that we thought all companies under our jurisdiction are obliged to do so under all circumstances. The North American and Pennsylvania Power Cases[20] are not inconsistent with the conclusion reached here."

"[20] Re North American Co. (1939) 4 SEC 434; Re Pennsylvania Power & Light Co. (1939) 5 SEC 684."

[19] See cases cited in footnote 12, *supra*. It is true that these cited cases have all involved the retirement of the debt security in

In later § 11 (e) cases, the courts, in enforcing and reviewing them, after concluding that the redemption provisions were inapplicable to a retirement under § 11, have also turned to the question of the value of the bonds and they have not assumed that there is a universal rule requiring the payment of 100 in all such cases. In Guaranty Trust Co. of New York v. Securities and Exchange Commission (1945) 61 PUR(NS) 175, 151 F (2d) 326, 333 (Standard Gas & Electric Company Case, *supra*, note 12), the circuit court of appeals for the third circuit, after concluding that the voluntary redemption provisions of the indentures were not applicable to a retirement of debentures under § 11, stated:

"Actually it was not incumbent upon the Commission to reduce the result to dollars and cents in the process of valuation. All that is required is a 'comparison' of the new securities with the old 'to determine whether the new are the equitable equivalent of the old.' Group of Institutional Investors v. Chicago, M. St. P. & P. R. Co. (1943) 318 US 523, 87 L ed 959, 63 S Ct 727. Two factors that bulk largest in determining the 'equitable equivalent' of what was at least nominally a debenture, though founded on common stocks, are safety and interest rate."[20]

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question at the face amount. Normally, unless the rate of interest provided by a debt instrument is at variance with the credit rating of the issuing company, the value of the debt is equal to the face amount. Consequently, in determining what creditors should receive in circumstances such as are present here, the starting point is regarded as the face amount. If, upon analysis, the presence of factors which materially affect the credit rating of the issuer or the issue is noted, it then becomes appropriate to adjust the amount payable to reflect the influence of such factors upon the value of the security and the fairness of the proposed discharge of the security.

Our Rule U-42(b) provides an exception from the general requirement of securing the Commission's approval for the retirement by an issuer of its securities where the security is to be retired "for the consideration specifically designated therein." Consequently, where debt securities are retired at the call price, this Commission, pursuant to the exception granted in Rule U-42(b), does not exercise jurisdiction over the call even where the debt retirement is compelled because of § 11. Thus, Electric Power & Light Corporation (an associate company of American in the Electric Bond and Share holding company system) which has also been ordered to dissolve under § 11(b)(2) recently retired a portion of its debentures at the call price without securing the Commission's authorization pursuant to the exception contained in Rule U-42(b). Consequently, the only cases that have come before us are those wherein the company sought to retire senior securities at an amount less than the call price. In the light of the considerations discussed herein, we shall take under advisement the desirability of limiting the exemption afforded by the rule.

[20] This case involved giving debenture holders portfolio common stocks in exchange for their debentures rather than cash as in the instant case. The principles stated by the court, however, are applicable, we believe, irrespective of whether the equitable equivalent given a security holder for his claims is stock or cash. See Re Laclede Gas Light Co. (1944) 58 PUR(NS) 414, 432, 57 F Supp 997, *supra*, note 12, Judge Hulen, in ordering the enforcement of a plan under § 11 (e) involving, among other things, the retirement of bonds of an operating company at 100, in cash, turned to the question of the value of the bonds after having found the redemption provisions inapplicable because of the involuntary nature of the retirement. Judge Hulen stated the issues as follows:

"Having held the provisions for payment of premium of the mortgage securing the 1919 bonds not applicable to the situation now confronting Laclede Gas, the sole question remaining is, has the value of the bondholders' rights been recognized under the plan so that the amount they are to receive is the equitable equal of their present holdings? Is the plan fair and equitable and appropriate to effectuate the provisions of § 11?"

See also Re North Continent Utilities Corp. (1944) 54 PUR(NS) 401, 405, 54 F Supp 527, *supra*, note 12, where, in approving a plan under § 11(e) providing for the retirement of debentures at 100, Judge Leahy said:

"The language of the indenture plainly indicates that the parties did not contemplate that the redemption provision should be effective upon action taken by the corporation

American also relies heavily upon common law cases (also cited by us in our early two cases) involving frustration of contracts growing out of such diverse situations as termination of leases due to the passage of the Eighteenth Amendment, seizure by the government of a ship subject to charter, condemnation of a property by a municipality, etc. None of these cases involved a statute such as the Holding Company Act, which as we have previously pointed out, requires that, in a reorganization under § 11, a security holder must receive the equitable equivalent of the rights surrendered by him and that such reorganization must not produce a windfall for one class of security holders at the expense of another. We do not believe these common-law decisions arising in an entirely different context require us to achieve inequitable results in § 11 reorganizations. In this connection, compare the language of the Supreme Court, speaking through Justice Frankfurter, in Securities and Exchange Commission v. Chenery Corp. (1943) 318 US 80, 87 L ed 626, 47 PUR(NS) 15, 21, 63 S Ct 454, a case arising under § 11 (e) although involving a different factual situation:

"Determination of what is 'fair and equitable' calls for the application of ethical standards to particular sets of facts. But these standards are not static. In evolving standards of fairness and equity, the Commission is not bound by settled judicial precedents. Congress certainly did not mean to preclude the formulation by the Commission of standards expressing a more sensitive regard for what is right and what is wrong than those prevalent at the time the Public Utility Holding Company Act of 1935 became law."

We are unable to agree with American that decisions of this Commission or the courts foreclose us from free consideration of the issues in this case or require the payment of 100 in all debt retirement cases arising under § 11. We believe that any statements in our early opinions and in our briefs to the courts in such cases which could lead to the conclusion that 100 is payable under any or all circumstances should not be followed because of the obviously inequitable results that such a rule would produce.

American has also urged that we are precluded from considering the fairness of its proposed retirement of its debentures at principal amount for still another reason. American states that since, in prior years, the Commission approved programs submitted to the Commission by American which provided for the acquisition in the open market of American's debentures at prices in one instance not to exceed

in an effort to comply with the mandate of Congress embodied in the Public Utility Holding Company Act of 1935. In Re United Light & P. Co. (1943) 51 PUR(NS) 235, 51 F Supp 217, I held valid a plan which gave something to common although there was not sufficient to pay the liquidating preferences on the preferred. Since the charter provided that the preferred was to be entitled to the stated preferences whether the dissolution or liquidation was voluntary or involuntary, that opinion is a fortiori authority for the action of the Commission in the present matter in finding under all the circumstances, 'including the earning coverage of the bonds, the financial condition of the company, the prospects of advantageous sales of its portfolio securities, and the benefits accruing to all security holders from liquidation rather than reorganization' that the payment of the bonds in the amounts provided in the plan, and without the premium, is fair and equitable. It may be under a different fact situation the Commission might determine that a premium should be included in such payment."

100 and in another instance not to exceed 106, that it is unfair now to require the remaining debentures of American to be retired at an amount in excess of the principal amount thereof.[21] In each of these instances the maximum price to be paid was fixed in American's application to the Commission but no minimum price below which purchases would not be made was proposed by American. We permitted American to carry out this purchase program imposing a condition in the first instance that no purchases be made below 95.[22]

Our approval of the initial and modified programs was based on the fact that debenture holders who elected to sell had a fair and reasonable choice of selling or retaining their debentures. If they elected not to sell, we found that there was "reasonable assurance that the assets and earnings of American are adequate to satisfy their prior claims.[23] Under these circumstances, and particularly because of the voluntary nature of the purchase program, it was unnecessary for us to determine the fair value of the debentures. Our second opinion relating to the purchase program expressly indicated that there was an open question as to whether American's debentures would be dischargeable at principal amount.[24] Moreover, we have permitted a number of other voluntary purchase programs by companies subject to our jurisdiction under the act and in no other case has it been urged that such approval constituted a bar to our consideration of the question of fairness when it was proposed to retire the entire issue pursuant to a plan under § 11 (e). We do not believe, therefore that our action permitting American to carry out the purchase program proposed by it precludes us from a free consideration of the issues in this case.

On the basis of the above, we conclude that the "fair and equitable" standards of § 11 (e) require us to consider the treatment of all security holders in the light of their existing status and their present rights apart from the operation of § 11, and that, therefore, we are required to determine whether American's debenture holders are receiving a fair equivalent of their rights. We turn now to a consideration of this issue.

Investment Position of the Debentures

[10] In assaying the inventment

[21] On February 22, 1943, we entered our order authorizing American to expend up to $10,000,000 of its cash during a four months' period in the purchase on the open market of the American and Southwestern debentures at prices not less than 95 per cent nor more than 100 per cent of principal amount, the maximum having been fixed in American's proposal. We later modified and extended such authorization (the last of such extensions expired on August 10, 1944) so as to permit American to pay a price not in excess of 106 per cent of principal amount, the excess over 100 per cent representing, in the opinion of American, an amount which would be less than the interest which would accrue during the period before American could effect the compulsory retirement of all the debentures under the Act. Re American Power & Light Co. (1943) Holding Company Act Release No. 4133; Re American Power & Light Co. (1943) Holding Company Act Release No. 4483.

[22] Such condition was unnecessary in the second instance because the market price of American's debentures had risen substantially.

[23] Re American Power & Light Co. (1943) Holding Company Act Release No. 4133.

[24] In this respect, the Commission said: "Whether American will effect interest savings under the proposed modified program will, of course, depend upon the prices it pays for the debentures and *whether* and when the debentures will be dischargeable at par." Re American Power & Light Co. (1943) Holding Company Act Release No. 4483. (Italics supplied.)

worth of American's debentures, a factor of prime significance is that American holds (and has held for some time) substantial amounts of cash items and debt securities of its subsidiaries. As of December 31, 1944, American's net current assets aggregated $35,649,000. Included in the current assets was $35,032,108 of cash and short-term government bonds. In addition to this cash, American held $24,313,400 of debt securities of its larger electric utility subsidiaries.[25] Thus, cash and such debt securities alone as of December 31, 1944, aggregated $59,345,508 or 1.63 times the principal amount of American's outstanding debentures.[26]

In addition to these assets American also owns a large portfolio of common stocks. The underlying book value of these common stocks plus the debt securities of subsidiaries held by American which were eliminated in the previous computation aggregated $256,355,460 as at December 31, 1944. If adjustments are made in the accounts of the subsidiaries for Account 107 items[27] in the amount of $129,685,457, deferred debits in the amount of $12,731,695, and undeclared cumulative dividends on preferred stocks of subsidiaries held by the public in the amount of $3,859,627 [28] the adjusted underlying book value of such portfolio securities would be $104,878,681. Further adjustment of $35,960,934 for net Account 100.5 items[29] would result in a reduction of the above adjusted underlying book value to $68,917,747. The sum of American's holdings of cash and debt securities plus the adjusted underlying book values of the other portfolio securities as shown above is to be compared with American's outstanding debentures in the principal amount of $36,389,600.

[25] For purposes of this computation, American's holdings of debt securities of the following companies, as at December 31, 1944, are excluded:

New Mexico Electric Service Company	$567,000
Texas Public Utilities Corporation	2,200,000
Topeka Land Company	315,725
Loup River Public Power District	5,200,000
Washington Irrigation & Development Co.	54,800
Total	$8,337,525

[26] While the figures in the text are as of December 31, 1944, we note that since that date American has consummated transactions and has proposed certain other transactions which will have the effect of reducing its cash and debt securities position. The major transactions consist of an investment of $15,500,000 of cash in the common stocks of Texas Power & Light Company and Texas Electric Service Company (See Holding Company Act Release Nos. 5742, April 20, 1945, and 5797, May 15, 1945) and an undertaking to supply $17,400,000 to a newly formed subsidiary to purchase the common stock of Dallas Power & Light Company (See Holding Company Act Release No. 6021, Aug. 30, 1945). These transactions will, if the Dallas acquisition is consummated, reduce the cash and debt securities held by American by about $30,000,000 after giving effect to earnings received by American since Deecmber 31, 1944. As against these reductions in the holdings of cash and debt securities, there will be substantially increased common stock earnings resulting from the added investment in the Texas companies and the acquisition of the common stock of Dallas Power & Light Company.

[27] Amounts classified in Account 107 represent, generally speaking, the amounts by which the book carrying value of property exceeds the arm's-length cost to the company of such property. The amount of such Account 107 items are those shown in the notes to American's consolidated balance sheet.

[28] The bulk of such undeclared cumulative dividends, $3,713,328, are applicable to the preferred stocks of Portland Gas & Coke Company.

[29] Amounts classified in Account 100.5 represent, generally speaking, the amounts by which the arm's-length cost to the company of property exceeds the original cost of such property. The net amount of the Account 100.5 items herein deducted is the sum of all such items mentioned in the notes to American's consolidated balance sheet less applicable reserves.

[11] In determining the worth of American's debentures it is necessary to consider the earning power of American's assets, including both the debt securities and the common stocks of the subsidiaries which are owned by American. Table I shows for the past eleven years the consolidated earnings of the American system, the charges of publicly owned securities, and American's fixed charges. Table I shows for the past eleven years the sources of income actually received by American, and American's debenture interest requirements and other expenses.

TABLE I

American Power & Light Company and Subsidiaries

Year	Consolidated Earnings Available for Fixed Charges Including Preferred Dividends of Subsidiaries	Fixed Charges, Preferred Dividends and Minority Interest of Subsidiaries	Fixed Charges of American	Total Over-all Charges	Over-all Charges Times Earned
1934	$30,829,787	$23,765,766	$3,104,092	$26,869,858	1.15
1935	34,118,435	23,597,148	3,008,811	26,605,959	1.28
1936	36,441,954	23,135,050	2,908,098	26,043,148	1.40
1937	37,264,727	22,906,152	2,910,497	25,816,649	1.44
1938	35,175,872	22,859,663	2,907,103	25,766,766	1.37
1939	36,953,275	23,157,263	2,892,903	26,050,166	1.42
1940	37,410,441	22,989,906	2,833,623	25,823,529	1.45
1941	35,452,347	23,015,580	2,831,882	25,847,462	1.37
1942	36,708,255	22,996,525	2,775,552	25,772,077	1.42
1943	40,413,117	22,708,278	2,614,289	25,322,567	1.60
1944	40,378,666	22,173,252	2,294,244	24,467,496	1.65
Total	$401,147,786	$253,304,583	$31,081,094	$284,385,677	1.41

TABLE II

AMERICAN POWER & LIGHT COMPANY

Income Sources, Expenses and Taxes and Debenture Interest Requirements

Year	Interest From Subsidiaries	Preferred Stock Dividends From Subsidiaries	Common Stock Dividends From Subsidiaries	Other Income	Total Income	Corporate Expenses and Taxes	Income Available For Fixed Charges	Debenture Interest Requirements	Times Debentures Interest Requirements Earned
1934	$2,778,209	$20,290	$3,622,790	$53,775	$6,475,064	$192,999	$6,282,065	$3,048,630	2.06
1935	2,739,623	22,660	5,721,395	28,678	8,512,356	294,662	8,217,694	2,954,945	2.78
1936	3,046,177	27,418	6,991,926	23,086	10,088,607	424,198	9,664,409	2,852,085	3.38
1937	2,870,484	67,105	8,002,481	55,510	10,995,580	417,606	10,577,974	2,852,010	3.71
1938	2,863,863	120,704	6,358,172	75,209	9,417,948	424,626	8,993,322	2,850,674	3.15
1939	2,782,255	162,299	8,701,400	97,409	11,743,363	455,217	11,288,146	2,836,168	3.98
1940	2,596,041	217,238	9,065,536	72,123	11,950,938	648,579	11,302,359	2,775,821	4.07
1941	2,622,488	950,383	6,978,670	65,613	10,617,154	764,480	9,852,674	2,774,487	3.55
1942	2,641,002	178,653	6,229,096	65,740	9,114,491	731,683	8,382,808	2,709,826	3.09
1943	2,623,712	170,763	8,942,550	93,116	11,830,141	782,449	11,047,692	2,552,997	4.32
1944	1,498,127	17,234	6,439,459	307,511	8,262,331	781,000	7,481,331	2,236,394	3.35
Total	$29,061,981	$1,954,747	$77,053,475	$937,770	$109,007,973	$5,917,499	$103,090,474	$30,444,087	3.39

The above tables indicate that the consolidated gross income of the system over the 11-year period was $401,147,786 and that the requirements of the publicly-owned securities of the subsidiaries aggregated $253,304,583 or 63.1 per cent of the available consolidated gross income. These computations ignore the fact (favorable to the debentures) that a substantial portion of American's income, the $29,061,981 derived from the holdings of debt securities of the subsidiaries, has a rank senior to the preferred stocks of the subsidiaries and on a parity with their publicly held debt securities. Fixed charges of American totaled $31,081,094 in the period, and total over-all charges of the subsidiaries and American totaled $284,385,677 or 70.9 per cent of the available consolidated gross income. Total over-all charges were, therefore, earned on the average 1.41 times in the 11-year period. There remained, after such total over-all charges, $116,762,109 of consolidated earnings for the stockholders of American.

In the 11-year period American received $29,061,981 in the form of interest on debt securities of the subsidiaries owned by American, $1,954,747 in the form of preferred stock dividends and the total consolidated earnings available for the common stocks owned by American was $116,826,475 of which American took up in the form of dividends $77,053,475. Total corporate income of American aggregated $109,007,973, and the income available for American's fixed charges aggregated $103,090,474 or 3.39 times the debenture interest requirements.

As we have previously mentioned, the net current assets of American and the debt securities owned by it were 1.63 times the principal amount of American's debentures as of December 31, 1944. Subsequent to that date there have been numerous transactions which have had the effect of decreasing the aggregate amount of the cash and underlying debt securities, with corresponding increases in the portfolio common stocks owned by American and in the quality of such stocks.[30] Solely on the basis, however, of American's common stock holdings in the 11-year period 1934–1944, it appears that the aggregate earnings on such stocks were $116,826,475 or an annual average of $10,620,589. While we do not think it necessary at this time to arrive at any specific valuation of the portfolio common stocks owned by American, the above figures indicate the degree of protection available for the debentures.

American has filed an application to convert its presently outstanding stocks into a single class of common stock. The testimony in that case is incorporated in the record in these proceedings. In the course of the hearings therein, American introduced testimony by William A. Paton and Merwin H. Waterman, professors of accounting and finance at the business school of the University of Michigan, and by operating officials of its own subsidiaries, with respect to prospective earnings of the operating companies in the post-war years. We do not believe it is necessary at this time to discuss the methods used by Paton and Waterman and the operating officials, or the soundness of their conclusions: it is sufficient for present

[30] See note 26, *supra*.

purposes to note that the forecasts of future income offered by American exceed the 11-year record which we have summarized above.

American bases its claim that the fair value of the debentures is not in excess of their principal amount largely upon the testimony of Paul B. Coffman.[31] Coffman's study was limited to an historical analysis of the asset and earnings coverages of the American system and to a history of the debentures since their issuance. The conclusions that he reached are that the debentures do not have a value in excess of 100.

We have carefully considered Coffman's valuation study and, without commenting in detail upon the propriety of the methods used, we are of the opinion that his conclusions must be rejected. Coffman failed to take into account the effect upon the value of the debentures of the improving earnings of American's subsidiaries, lowered money rates, and the refundings of senior securities of subsidiaries which are in prospect. He consistently failed to take into account the fact that American's investments are not all at the common stock level and that, as we have pointed out previously, the large proportion of such senior securities owned by American in relation to the outstanding debentures strengthens the position of the debentures considerably. In addition, Coffman relied heavily on the contention that the total amount of subsidiary debt and preferred stocks at the end of 1943 was slightly in excess of similar securities at the end of 1934 and that these securities ranked ahead of American's debentures but Coffman failed to take into account that the assets of the American system actually expanded during the past ten years by approximately $50,000,000 without increasing the amount of subsidiary debt and preferred stock securities outstanding in the hands of the public although as a result of the elimination of write-ups the reported consolidated net property of the system increased only slightly. Moreover, Coffman, in comparing American's debentures unfavorably with high grade utility bonds, failed to take sufficiently into account that such bonds sell on lower than a 3 per cent basis while American's debentures bear an interest rate of 6 per cent. For these reasons, as well as others indicated in the record, we are of the opinion that Coffman's conclusions on the value of the debentures are not entitled to substantial weight.

The crucial issue involved in the determination of the value of the debentures is whether the contract interest rate of 6 per cent fairly reflects the degree of safety enjoyed by the debentures. If the maximum interest rate justified by the risks is as low as approximately 5.45 per cent, the debentures would have a value of 110, the ceiling price payable to the holders of the American debentures in view of the call provisions.

After giving consideration to all the evidence, the conclusion we reach is that the value of the debentures is 110. Among the facts which we have considered are the substantial refundings which have taken place since December 31, 1944, and which

[31] Coffman is president of Standard Research Consultants, Inc., a wholly owned subsidiary of Standard & Poor's Corporation.

are in prospect[32] and the substantial impact of excess profits taxes on the system. We note, however, that a number of American's subsidiaries are earning relatively high rates of return. While we have taken into account the relatively high rates of return enjoyed by certain of the subsidiaries, we have also given due weight to the large amount of net current assets and debt securities of the subsidiaries held by American, which provide a security of asset position and a stability of income expectancy not present in the case of a holding company owning only common stock. We have also considered the further facts that the fixed charges and dividend requirements of the publicly held securities of the subsidiaries, including the minority interest in common stocks, were covered 1.58 times by the system's consolidated gross income in the years 1934–1944, and that the overall consolidated coverages of the publicly held securities of the subsidiaries plus the American debentures was 1.41 times in the same period.[33] It is true that American's debentures are not of the same investment quality as top-grade public utility first mortgage bonds which presently sell on less than a 3 per cent basis.[34] However, we have no hesitancy in concluding that the maximum interest rate justified by the risks assumed by the debenture holders is less than 5.45 per cent which, as we have indicated, is the rate which produces an approximate value of 110.[35] We are, in fact, of the opinion that a valuation substantially higher than 110 would be proper if the debentures were not callable at that figure.

[32] Lee P. Stack, financial vice president of John Hancock Mutual Life Insurance Company appearing as a witness for that company, estimated that gross annual savings from refundings in the amount of $2,800,000 could be realized in present markets. Since December 31, 1944, Texas Electric Service Company and Texas Power & Light Company, two major electric utility subsidiaries of American, completed their programs for refinancing their outstanding long-term debt. Texas Electric Service Company issued and sold $18,000,000 of its first mortgage bonds, 2¾ per cent series due March, 1975, at an effective interest cost to the company of 2.73 per cent, and Texas Power & Light Company issued and sold $31,500,000 principal amount of its first mortgage bonds, 2¾ per cent series due May 1975, at an effective interest cost to the company of 2.74 per cent. The face rates of the issues refunded ranged from 4¾ per cent to 5 per cent. See Re Texas Electric Service Co. (1945) Holding Company Act Release No. 5742; Re Texas Power & Light Co. (1945) Holding Company Act Release No. 5798. Minnesota Power & Light Company has, since Deecmber 31, 1944, consummated a reorganization in which the dividend rates on its then outstanding $7 and $6 preferred stocks were reduced to $5. See Re Minnesota Power & Light Co. (1945) Release No. 5850. In addition, Minnesota has recently refunded its outstanding 4¼ per cent and 5 per cent mortgage bonds with bonds bearing an interest rate of 3¼ per cent, which were sold at an effective interest cost to the company of 3.038 per cent. Reference to Appendices F and G show other high yield securities of subsidiary companies of American which are refundable at substantial savings.

[33] On the basis of the forecasts of Paton and Waterman and of the operating officials of American's subsidiaries, future earnings coverages would be higher than those in the text.

[34] Among other things in this connection, we have considered the terms of American's debenture indenture, which does not afford to American's debenture holders the safeguards against corporate mismanagement contained in either first mortgage indentures of operating companies or debenture indentures of holding companies authorized by us in connection with the issuance of securities under the act.

[35] It is to be noted that Moody's rating for the American debentures is Ba and that Standard & Poor's Corporation's rating is B1 + which is one grade higher than the Moody's rating. Standard & Poor's monthly public utility bond yield index for B1 bonds (same as Ba in the Moody's rating system) has consistently been below 5.00 per cent since January, 1941, and as of May, 1945, was 4.36 per cent. The average yield of B1 + utility bonds for May, 1945, according to the same index was 3.02 per cent.

Conclusion

[12] In the light of the foregoing we are unable to approve the plan since it provides for retirement of the American and Southwestern debentures at 100.[86] In the case of the American debentures we are of the opinion that the holders thereof should receive 110 plus accrued interest to the date of payment; the precise amount which the Southwestern debentures should receive (in no event less than 110) would depend on the time when they were paid.[87]

At the present time we shall enter no order with respect to the plan. If, within thirty days from the date of this opinion (or such additional time as may be granted upon a proper showing), the plan is amended in accordance with this opinion, an order will be granted approving the plan. If within such time no amendment is filed, we shall enter an order disapproving the plan.

American has requested a further extension of its authorization to purchase debentures in the open market.[88] In our opinion at this stage of American's program for retirement of its debentures it would not be appropriate to continue open market purchases. Accordingly, we shall enter an order denying American's request for authority to continue open market purchases of its debentures.

HEALY, Commissioner, dissenting: My conclusions are:

(1) the payment of American's debt is necessary to effectuate the provisions of § 11;

(2) the proposal to pay off the debt at its principal amount plus accrued interest is fair and equitable to the creditors and stockholders;

(3) a requirement that the company pay $1,000 and accrued interest for each $1,000 debenture is unfair and inequitable to the stockholders, and to those debtholders from whom American has repurchased debentures on the basis of tenders or open market purchases with the approval of this Commission.

I

The first question for decision is whether the payment of the company's debt is necessary under § 11 of the Holding Company Act. If necessary, it is because the company has been ordered by this Commission to dissolve by an order dated August 22, 1942, 11 SEC 1146, 46 PUR(NS) 321. This order of the Commission was affirmed on appeal by a circuit court of appeals (1944) 53 PUR (NS) 16, 141 F(2d) 606. The company petitioned the Supreme Court

[86] While we have found that American's debentures may not be retired at less than 110, it should be noted that the debentures, which are the senior claim to American's assets, constitute a relatively small part of American's total corporate capitalization. Our opinion herein is not to be considered as a finding with respect to the value of the balance of American's capitalization and the relative participations to be accorded American's preferred and common stocks in future proceedings in connection with the dissolution of American.

[87] As previously noted the Southwestern debentures are noncallable until February, 1947, at which time they are callable at 110. Since in our opinion an interest rate lower than 5.45 per cent would properly reflect the risk incident to the debentures, the Southwestern debentures at the present time have a value slightly higher than 110, although the American debentures do not because they are presently callable at that figure. The precise differential, if any, which the Southwestern debenture holder should receive is determinable only when the date of payment is known.

[88] See note 2, *supra*.

for a writ of certiorari to review that decision (1945) — US —, 89 L ed —, 65 S Ct 1400. The writ was granted and the case is pending in the Supreme Court. In that court, as in the circuit court of appeals, the company is vigorously, perhaps vehemently, contending that the order of dissolution directed against it is invalid and that the statute under which the order was issued is unconstitutional. At the same time the company is contending before us with equal vigor and vehemence that the retirement of its debt securities is necessary and not a matter of choice because the company is being compelled to dissolve. Since it must dissolve, it argues, it must in the process of doing so pay it debts. But the compulsion to dissolve rests entirely on the very order of this Commission which the company is asserting in the Supreme Court is invalid and void.[1] The inconsistency of the position taken by the company before the court where it is fighting desperately to avoid dissolution and before us where it is asserting that it is being compelled to dissolve and therefore need pay no premiums upon the retirement of debt, raises serious questions in my mind as to the company's sincerity in its arguments before us. Nevertheless, since I regard the order as valid and the act as constitutional it is my belief that the company will be compelled to dissolve as the Commission has directed.[2] My conclusion therefore is that the payment of the debt is necessary as an aspect of a dissolution compelled by the terms of the statute.

II

The other question for decision is whether the plan is fair and equitable in providing for the payment of the debt in cash at 100 per cent of its principal.

Since the dissolution of the company and therefore the payment of its debt is required by § 11 of the act, the payment is involuntary. The debenture holders are consequently not entitled to the premium which under the terms of the contract is payable only in the event of voluntary redemption. There are no provisions in the contract defining the rights of the parties in case of involuntary dissolution. In this respect the case differs from Otis & Co. v. Securities and Exchange Commission (1945) 323 US 624, 89 L ed 511, 57 PUR(NS) 65, 65 S Ct 483. Therefore the holding in that case that the rights of the parties defined in the contract in the event of involuntary dissolution do not control when dissolution is forced by the Holding Company Act has no application here.

Since the contract does not define the rights of the creditors in case of

[1] In the dissolution proceeding American contended that the Commission's order should contain a reservation to the effect that American should have the right to apply to us for the revocation or modification of the order if American ceased to be affiliated with Electric Bond and Share Company, reduced its capital structure to a single class of stock and contracted to a single integrated system. The Commission replied that § 11(b) itself makes provisions for revocation or modification of its order, if it is found that the conditions upon which the order was predicated do not exist. 11 SEC at pp. 1222, 1223.

Subsequently the company filed with us a plan for reducing its capitalization to one class of stock. This seems to me quite at odds with dissolution and entirely unnecessary for any such purpose, although it is consistent with a program of simplification and contraction to limits permitted by the act.

[2] Or in any event, it must so reorganize itself and its activities as to necessitate retirement of its debt.

involuntary dissolution the guides to their rights must be found elsewhere. The debentures holders, the majority also seems to agree, are not entitled to compensation for the termination of their contract since the termination is imposed by law and is beyond the control of the stockholders quite as much as the debtholders. Yet under a doctrine that the debtholders are entitled to be compensated for the *value or present investment worth* of their claim, they are to be paid an extra $100 per bond just as surely as if the $100 bore the label "premium" or "compensation for the termination of contract." I cannot accept that doctrine. The debt is $1,000 per debenture. The debentures are not debt, but evidences of debt.[3] In holding as the Commission has in several cases that no such premium or compensation was payable in case of involuntary dissolution under § 11, the Commission (and the courts at the Commission's instance) has by express language or fair implication excluded the idea that the claim of a creditor in case of involuntary dissolution is not the debt itself but its value, or investment worth. The creditors are entitled to be paid their debt. As the circuit court of appeals for the third circuit quite recently said in the Standard Gas & Electric Case (1945) 61 PUR(NS) 175, 151 F2d 326, 330: "The noteholders have no specific lien but they are entitled to have their money paid back to them before the shareholders divide what is left."[4] Considerations of present value, in my opinion, are immaterial and introduce an approach which has been rejected by the Supreme Court, as I shall point out later.

Applying the rule of absolute priorities and the reorganization principles, which the Supreme Court in Otis & Co. v. Securities and Exchange Commission, *supra* held applicable to § 11 reorganizations, the claim of the creditors is the debt plus accrued interest. That is the measure of their claim. A cash payment in that amount satisfies the debt and affords them full compensatory treatment. That was the position taken by this Commission in the United Light and Power[5] and North American Light and Power[6] Cases and by the circuit courts of appeal that affirmed the Commission's orders.[7] The majority's present position conflicts with those decisions and the efforts to justify the departure from them, I believe, are unsuccessful. Requiring American to pay more than its debt is unfair to its stockholders. I repeat that the latter are quite as powerless as the creditors to prevent dissolution. It is also unfair to those holders who sold their debentures to American on the basis of implicit representations made by the Commission, and by American with the approval of the Public Utilities Division, that the

[3] See e. g., Los Angeles v. Teed (1896) 112 Cal 319, 44 Pac 580, 582; First State Bank v. Boe (1927) 122 Kan 493, 252 Pac 250, 254; State v. Merchants Nat. Bank of Mobile (1935) 230 Ala 661, 162 So 270; Groby v. State (1924) 109 Ohio St 543, 143 NE 126, 127; Re Stark's Will (1912) 149 Wis 631, 134 NW 389, 399; McIntire v. Garmany (1911) 8 Ga App 802, 70 SE 198.

[4] Compare the use of this citation in footnote 17 of the majority opinion.

[5] (1942) 10 SEC 1215, 42 PUR(NS) 193.

[6] (1942) 11 SEC 820.

[7] New York Trust Co. v. Securities and Exchange Commission (1942) 46 PUR(NS) 270, 131 F2d 274; City National Bank & Trust Co. v. Securities and Exchange Commission (1943) 48 PUR(NS) 195, 134 F2d 65.

debentures would not be retired at more than their face amount.

I shall now consider in more detail these general statements.

In Otis & Co. v. Securities and Exchange Commission, *supra,* the Supreme Court stated that the term "fair and equitable" in § 11(e) means what it means in the bankruptcy and reorganization statutes. In reorganization the claim of a holder of a debt security, that is the measure of his participation in the debtor's estate, is the principal amount of his security plus accrued interest.[8] Payment of that amount in cash is "fair and equitable" and accords the security holder the full compensatory treatment required by the absolute priorities rule. Once the amount of the claim is ascertained, no inquiry is made into its value. In other words, the question is not what is the worth of a claim, but what is the claim. This was made clear by the Supreme Court in Group of Institutional Investors v. Chicago, M. St. P. & P. R. Co. (1943) 318 US 523, 87 L ed 959, 63 S Ct 727, where it explicitly rejected the contention that claims in reorganization should be valued. In that case, which was cited by the Supreme Court in the Otis Case, *supra,* a plan of reorganization provided for the exchange of the debtor's outstanding securities for new securities. It was argued that "a dollar valuation must be made of each old security and of each new security in order to give 'full compensatory treatment' to senior claimants . . ." (318 US at p. 564). It was to this contention that the court replied: *"A requirement that dollar values be placed on what each security holder surrenders* and on what he receives *would create an illusion of certainty where none exists and would place an impracticable burden on the whole reorganization process.* . . . It is sufficient that each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered. That requires a comparison of the new securities allotted to him with the old securities which he exchanges to determine whether the new are the equitable equivalent of the old."[9] (318 US at pp. 565, 566; italics added.)

As I understand this, it expresses two propositions relevant to the instant case and the position taken by the majority. First, as the court expressly stated, claims in reorganization should not be valued. The amount of the claim once determined is the measure of its participation; the worth or value of the claim is immaterial. Second, the principle of "equitable equivalent" declared by the court

[8] This was recognized in United Light and Power Co. *supra,* where in considering whether a premium should be paid on debentures that were being retired by a company subject to a § 11 order of dissolution, the Commission stated that the liquidation of the company was similar to a bankruptcy liquidation and declared: "In liquidation or reorganization procedings, . . . the amount of the claim is regarded as based on its face amount and accrued interest, . . ." (10 SEC at p. 1225, 42 PUR(NS) at p. 202.)

[9] In the Otis Case, *supra,* the court stated (323 US at pp. 639, 640, 57 PUR(NS) at p. 74): "The allocation [between security holders in a § 11 reorganization] properly may be made without dollar valuation so long as 'each security holder in the order of his priority receives from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered,'" citing Group of Institutional Investors v. Chicago, M. St. P. & P. R. Co. *supra.*

is relevant where new securities are being issued in exchange for old securities. It was in this setting that the principle was enunciated, and it is under those circumstances only that it appears to be applicable and appropriate. It is not relevant where debt is to be paid off in cash. Where old securities are being surrendered for new securities, it is important to consider whether the new securities and the rights they confer are the equitable equivalent of the old securities that are to be surrendered. Since it is just about impossible, as the Supreme Court pointed out in the Milwaukee Case, *supra,* to determine whether the new are the precise equivalent of the old, it is sufficient if they are found to be the "equitable" equivalent. However, the *precise* equivalent in cash of a $1,000 debt is $1,000.[10]

A logical application of the present worth doctrine would result in the retirement of debt securities below as well as above their principal or face amount. Thus, where the contract rate of interest of a debenture is less than the current rate on a security with comparable risks, adherence to this principle would necessitate a payment of less than principal or face amount upon its retirement. For example, if the debt bears 6 per cent interest and the going rate of interest for comparable risks at the time of involuntary retirement is 7 per cent, then the present worth or investment value under a present worth formula is 86 per cent of the principal amount of the debt, or $860 for each $1,000 debenture. I submit that permitting the discharge of a debt of a solvent company at less than face amount would be a windfall to the stockholders and an injustice to the creditor. The majority opinion does not carry its fundamental doctrine through to its logical conclusion —that creditors should be required to accept less than the amount of the debt when its present investment value is less than the face amount.[11] To do that would give rise to a most serious question of constitutional law. It would also cast a cloud over trading in debt securities subject to the act since those deciding to buy, sell, or hold such securities could not so with the assurance that the debt claim which would be paid if the company were dissolved involuntarily or its debt decreased through sales forced by the act would be $1,000 per bond or per note or per debenture, but only some unpredictable amount which the Securities and Exchange Commission at some future time might find on the basis of then existing market conditions was the

[10] The majority opinion states that if American's debentures, with their maturity seventy-one years distant, bore a contract rate of 8 per cent whereas an interest rate of 4 per cent would be the current rate for comparable obligations and the debentures were retired at 100, "The stockholder, . . . would be relieved of his disadvantageous contract which would require him for seventy-one years to pay 4 per cent extra interest each year than he would have to pay for funds currently raised by selling otherwise similar debentures. Payment at principal amount would thus deprive the debenture holder of substantial value, and transfer such value to the stockholders, giving them a windfall." (P. 136 of the majority opinion.) The fallacy of this argument is that there is no transfer of value since the debt capital of the enterprise is being forcibly withdrawn and the enterprise is being liquidated.

[11] The majority opinion says (at p. 139): "However, there may be reasons why the face amount of a debt claim is the minimum amount which it may be accorded. This is a question which is not before us in this case and is not decided herein."

If the principal amount is a minimum in the case of a solvent corporation, the majority's approach is a "one-way street."

present worth or investment value of that claim.[12] The effect on trading, negotiability and collateral values is likely to be serious. Furthermore, if claims in reorganization are to be discounted to present worth or paid off at investment value, the effect might often be that debtor companies would be bankrupt if liabilities were taken at face amount and solvent if taken at discounted or present value. Yet it is the insolvency or bad condition of the company that makes the debt worth less than its face amount.

The majority opinion states that the Otis Case, *supra,* established the principle that the "present investment worth of a security should be the measure of its participation in a § 11(e) plan." I can find no such holding in that case. I think that the majority opinion misconstrues and misapplies that decision. In that case, which dealt with the allocation of portfolio securities between stockholders of a holding company, the dissolution of which had been ordered under § 11, the court decided only a "narrow legal point," to use its own language. That point, which was decided in the affirmative, was defined by the court as follows:

". . . whether a plan under § 11 (e) of [the] act may be 'fair and equitable' to preferred stockholders . . . , which allows a participation by junior common stockholders in the distribution of the assets of a registered holding company, which is liquidated in compliance with § 11(b)(2), before the senior preferred stockholders receive securities whose present value equals the preferred's full liquidation preferences." (323 US at p. 625, 57 PUR(NS) at p. 66.)

That was the only point considered and decided by the court. Moreover, the significant fact which the majority opinion neglects is that in the Otis Case the preferred stockholders received less than that to which their charter rights on involuntary liquidation entitled them. The decision of the court was that those charter rights did not control. Here, however, the question is whether the creditors shall be paid *more* than the face or principal amount of their debt. It seems to me that it is one thing to hold that a preferred stockholder, upon a dissolution required by § 11, is not entitled to be paid his full liquidating preference in cash or securities and quite another to say that a debt being paid off in proceedings under that section must be paid off in cash at 10 per cent *more* than the principal amount of the debt.[13]

To summarize: under the bankruptcy and reorganization standards of fairness and equity, which are also applicable to § 11 reorganizations, the claim of a creditor is the debt plus accrued interest. A cash payment in that amount is full satisfaction of the claim and is "fair and equitable."

III

Adherence to the views expressed by the courts in their opinions affirm-

[12] In the case of noncallable securities (i. e. those without a ceiling fixed by a call price) the computation to be at all fair will have to be much closer to precision than the majority deemed necessary in the case of American's debentures. It will also be much more difficult. (However see footnote 15 of the majority opinion.)

[13] Nowhere in the Commission's opinion or the opinions of the district court, circuit court of appeals, or Supreme Court in the Otis Case was there any effort to appraise the present worth of the preferred stock.

ing the Commission's orders in the United Light and Power and North American Power & Light Cases, *supra*, requires approval of the company's proposal. The result reached by the majority departs from the principles declared by the courts in these cases. An examination of the cases makes this conclusion clear.

In the United Light & Power Case, the company, which had been ordered to dissolve by this Commission, filed an application with us providing for the retirement at par and accrued interest of three series of debentures due in 1973, 1974, and 1975 and bearing interest at the rate of 6 per cent, 6½ per cent and 6 per cent, respectively. It was contended in the Commission proceeding that under the terms of the debenture agreements the company was obligated to pay its debenture holders a premium of 9 per cent as in the case of a voluntary redemption or an equivalent amount as compensation for the termination of their investment in the company, if it should be held that a premium was not payable under the terms of the agreement. The Commission rejected both contentions and approved the plan. As to the first contention, the Commission stated, inter alia:

"We believe that the obligation to pay a premium was intended to arise only when the company was to continue as a going concern, for the payment thereof is in the nature of compensation payable by the company (i. e., its stockholders) to the debenture holders for depriving the latter of their investment. In a going concern, the stockholders may be deemed to benefit from the elimination or reduction of the debt effected by the redemption, and the premium may be regarded as the prearranged amount payable by them for such benefit.

"But here the company does not continue as a going concern. There is no question of free choice or election. The company, by virtue of congressional mandate, is to terminate its existence. Power must liquidate not only its debt but also its stock. The rights of debenture holders and stockholders alike to retain their respective investments, are cut off. Such holders must, of course, be compensated out of the estate to the full extent of their lawful claims. It is the extent of the debenture holders' lawful claim that is presented for determination here." (10 SEC at pp. 1221, 1222, 42 PUR(NS) at p. 199.)

. . . . . .

"In view of all the foregoing, we are impelled to the conclusion that the terms of the debentures and the covering agreements create no contractual obligation on the part of Power to pay a redemption premium and no right on behalf of the debenture holders to receive such premium. *We further conclude that no such obligation or right exists by virtue of any other recognized legal or equitable principle.* Such conclusion, we think, is neither in conflict with judicial precedents nor inconsistent with our own previous decisions.

"The rule of absolute priority, applied by the Supreme Court in the Los Angeles Lumber (1939) 308 US 106, 84 L ed 110, 60 S Ct 1, and Consolidated Rock Cases (1941) 312 US 510, 85 L ed 982, 61 S Ct 675, is not relevant to the point at issue. The rule does not create rights, but merely requires that such rights

and priorities as the senior claimants possess must be recognized and fully compensated in a plan of reorganization before awards are made to junior claimants. *The debenture holders are to receive the full amount of their principal and accrued interest in cash, and unless they establish a right to the redemption premium as well, there is nothing on which the absolute priority rule can operate.*" (10 SEC at p. 1223, 42 PUR(NS) at p. 200, italics added.)

With reference to the second contention, the Commission stated:

"Lastly, counsel for the debenture trustee argues that if the redemption provisions are held inapplicable so that the debentures are treated as being in effect noncallable, some compensation must still be given to the debenture holders for the termination of their investment. The call premium of 9 per cent is suggested as an appropriate measure of such compensation. *It seems to us a complete answer to this argument that the termination of the investments of debenture holders and stockholders alike has been brought about by the act of a sovereign power —in this case a congressional mandate.* We think the debenture holders have established no right to receive such compensation here at the expense of the stockholders, whose rights we must also consider." (10 SEC at p. 1228, 42 PUR(NS) at p. 204, italics added.)

The trustee under the debenture agreements then unsuccessfully appealed to the circuit court of appeals for the second circuit. The circuit court stated:

"Obviously Congress gave the Commission the power, subject to the review provided for its orders, to decide what was necessary in each instance to effectuate the provisions of subsection (b). It is quite as obvious that debenture holders are in no position to question the necessity of a provision in a plan which provides cash for them in exchange for their bonds *to the full extent of the contract* in the bond and this is especially true of the holders of callable bonds like these. . . . Consequently we pass to the substantial question of whether the plan providing for the retirement of the bonds was unfair and inequitable to the debenture holders in failing to require the payment of any premium.

"That depends upon the contract rights of the debenture holders under the applicable principles of contract law. . . . We have but to decide the effect on the debenture agreements of a lawful governmental order requiring the obligor to liquidate and give up its existence as a corporation before all payments of interest on the bonds have been made as agreed. . . . the future interest payments are excused because by the order of the Commission, i. e., by governmental power, which neither obligor nor obligee could control or with respect to which they made the contract, the venture has been frustrated. Restatement of Contracts, §§ 460, 461.

"Where, through no fault of either party, something necessary for the continued performance of a contract goes out of existence because of some unforeseen circumstance and none of the parties have assumed that risk the contract is regarded as charged with the implied condition that if what is necessary to performance becomes un-

available the contract is no longer binding and further performance is excused. Texas Co. v. Hogarth Shipping Co. (1921) 256 US 619, 65 L ed 1123, 41 S Ct 612; Chicago, M. & St. P. R. Co. v. Hoyt (1893) 149 US 1, 37 L ed 625, 13 S Ct 779. This is especially true where, as here, the essential existence of one of the parties to a contract has become illegal and impossible because contrary to a new concept of public policy which was unforeseeable when the contract was made. Holyoke Water Power Co. v. American Writing Paper Co. (1937) 300 US 324, 81 L ed 678, 57 S Ct 485; Louisville & N. R. Co. v. Mottley (1911) 219 US 467, 55 L ed 297, 31 S Ct 265, 34 LRA(NS) 671.

"This involuntary destruction of the corporation deprived it of any freedom of choice except perhaps as to the cost of its funeral. It certainly was not in a position to elect to pay a premium to better its capital structure for continued business purposes. And it certainly was under no obligation to exercise its option to call the bonds if it had nothing to gain by so doing. That motive absent, it might well let the rights of those in interest be determined as though there had been no call option. *The order under review was, accordingly, fair and reasonable to all parties in interest since it provided for the payment of the bonds in a way which discharged in full the contract obligations* of the dissolved corporation." (46 PUR(NS) at p. 272, 131 F2d at pp. 275, 276, italics added.)[14]

The trustee under the debenture agreements applied to the United States Supreme Court for a writ of certiorari to review this decision and the writ was denied.[15]

In the North American Power & Light Company Case, *supra*, the company, which was subject to an order of dissolution, sought Commission approval for the retirement at face amount and accrued interest of its publicly held 5½ per cent debentures maturing in 1956. In approving the application the Commission stated:

"When the stockholders, in the exercise of their free will, can liquidate and wind up the corporation because they deem it in their best interests to do so, it is understandable that express provision should be made to compensate the debenture holders for the loss of their investment by paying them a premium. But *in the situation of compulsory liquidation by a Congressional mandate cutting off the rights of all security holders, there is no occasion for compensation as between the various classes of security holders* and this reason for the payment of a premium is wholly inapplicable.

. . . . . .

"Since we have found that there is no provision in the debenture agree-

[14] In this connection the following statement made in the Commission's brief filed with the court should be noted:

". . . the debenture holders—precluded from obtaining either specific performance of the contract to pay interest *in futuro*, or damages for the loss of their bargain—may have restored to them only the principal of and accrued interest on their debentures." (Pp. 25-26.)

[15] It is interesting to note that in a Commission memorandum filed in opposition to a motion made by the New York Trust Company to the circuit court of appeals for the second circuit to vacate its decree in the New York Trust Company Case on the ground that it was inconsistent with the Otis Case, *supra*, the Commission stated:

"The majority opinion of the Supreme Court in the Otis Case cites the decision of this court with approval. . . ."

ment requiring the payment of a premium in the situation now confronting Light & Power and since we believe *there is no other legal or equitable principle* entitling these debenture holders to receive a premium, we conclude that the proposal is not objectionable, because it contemplates payment of only principal and accrued interest and no premium." (11 SEC at p. 824, italics added.)

The trustee under the debenture agreement appealed to the circuit court of appeals for the seventh circuit. In affirming the Commission's order, the court stated:

"In the beginning, we think it may be assumed that an order of the Commission which impaired or destroyed a property right fixed by contract would violate § 26(c) of the act. Furthermore, such an order would not be 'fair and equitable to the persons affected by such plan' as required by § 11 (e) of the act. Case v. Los Angeles Lumber Products Co. (1939) 308 US 106, 114, 84 L ed 110, 60 S Ct 1; Consolidated Rock Products Co. v. Du Bois (1941) 312 US 510, 85 L ed 982, 61 S Ct 675. Petitioner's contention in this respect, however, carries little, if any, force, because he must, as we view the matter, stand or fall on the issue as to whether Light and Power *was obligated by contract* to pay a premium on redemption under the circumstances with which it was confronted." (48 PUR(NS) at p. 198, 134 F2d at pp. 66, 67, italics added.)

The court defined the principal question before it to be "whether the debenture holders had a contract right to the payment of a premium upon redemption of the debentures occasioned by the involuntary act of Light & Power. In other words, did the order of the Commission, which required the payment of the debenture principal plus accrued interest without payment of premium violate a contract obligation?" (48 PUR(NS) at p. 200, 134 F2d at p. 68). After holding that the proposed retirement was not at the option of the company within the meaning of the redemption provision of the debenture agreement, the court continued:

"Numerous authorities are cited and discussed relating to the doctrine of impossibility of contract performance and the closely allied doctrine of frustration of purpose. In the recent case of New York Trust Co. v. Securities and Exchange Commission (1942) 46 PUR(NS) 270, 131 F2d 274, the court rejected the contention that the contractual provisions for redemption premium were applicable. The questions presented and decided in that case are almost identical with those of the instant case, and the cases relied upon here were in the main considered. Inasmuch as we agree with both the reasoning and the result in that case, we think no good purpose could be served by a discussion of such cases." (48 PUR(NS) at p. 201, 134 F2d at p. 69.)

The opinion closes with the statement:

". . . the *contractual rights* of the debenture holders having been recognized and satisfied, they have no cause to complain." (48 PUR(NS) at p. 203, 134 F2d at p. 70, italics added.)

As recently as September, 1945, in Re Standard Gas & E. Co. 61 PUR (NS) 175, 151 F2d 326, the circuit

court of appeals (and earlier the district court [1945] 58 PUR(NS) 278, 59 F Supp 274) held that not only was no premium payable in the event of a compulsory retirement of securities under § 11, but that the debtor's claim is the principal amount of the debt plus accrued interest.

To summarize: these decisions hold that in a retirement of debentures required by § 11 of the act a cash payment of principal amount and accrued interest, without a premium, was "fair and reasonable to all parties in interest since it provided for the payment of the bonds in a way which discharged in full the *contract* obligations of the dissolved corporation," to quote the circuit court of appeals for the second circuit (1942) 46 PUR(NS) 270, 274, 131 F2d 274, and as stated by the circuit court of appeals for the seventh circuit (1943) 48 PUR(NS) 195, 203, 134 F2d 65, ". . . the contractual rights of the debenture holders having been recognized and satisfied [by the payment of principal and accrued interest], they have no cause to complain." The treatment accorded the debenture holders was fair because their contract rights were satisfied, not because the debentures were valued and found to be worth their principal. Nowhere in these opinions, those of the courts or those of the Commission, was any reference or mention made of the investment value of the debentures involved.[16] To repeat, the retirement of the debentures at face amount and accrued interest was "fair and equitable" to the debenture holders because it gave them what their contracts called for.

The majority opinion in its efforts to reconcile the United Light & Power Case, *supra,* with its present approach states in substance that the issue of values was not raised by the parties to the proceeding. The short answer to this is that the case involved three series of similar debentures due 1973, 1974, and 1975 and bearing interest at the rate of 6 per cent, 6½ per cent, and 6 per cent, respectively. It is inconceivable as a matter of simple logic that these securities with differing interest rates should have the same investment value, yet they were treated alike.[17] Furthermore, the majority's argument for distinguishing the United Light & Power Case implicitly assumes that, in passing upon a plan, we consider only the issues raised by the parties. This is not, and has not

[16] In this connection it is interesting to note that while the burden of the argument in the brief filed by the Commission with the circuit court of appeals in the New York Trust Company Case, *supra,* was that on the basis of their contract the debenture holders were entitled to no more than face amount of the debt and accrued interest, an alternative argument dealing with the value of the debentures was advanced by the Commission. The argument was:

"If, *contrary to our contention* [i.e., that the contract of the debenture holders is satisfied by a cash payment of principal and interest], the court should conclude that compensation should be paid by Power for *loss in value* of the debenture holders' investment, there remains the question whether any such loss exists. We submit there is no showing of such loss on the record, . . . ;" a financial analysis followed. (P. 30, italics added.)

It is significant that the court made no reference to the proposition of loss of value or to the financial data presented. It rested its decision on the Commission's major contention, which the Commission now rejects. It did not reach the second point, which under the Commission's present approach is controlling. Consideration of the second point was unnecessary and superfluous under the court's rationale. Furthermore, the Commission made no reference to this alternate argument in its brief opposing the granting of certiorari in the case.

[17] The reference to this matter at p. 11 of the majority opinion can hardly be said to face this issue squarely.

been, the Commission's practice nor would it be consistent with its functions. We surely would not by-pass an issue which we considered controlling merely because the parties had failed to raise it. For that matter, in the initial hearing in this very proceeding, no expert testimony was presented by American regarding the value of the debentures, but at the request of the Commission staff such testimony was subsequently introduced. Finally, as a matter of fact, there was in the United Light and Power Case, a full record as to the assets and earning power of the company.[18]

The majority opinion states that in the Commission decisions since the United Light & Power and North American Power & Light Cases it has articulated its valuation approach and intimates that these later decisions of the Commission are consistent with that approach. The decisions in those cases are not consistent with the majority's present approach. I admit, however, that a close reading of the Commission's opinions in those cases discloses some language which the investing public may or may not have realized vaguely heralded the present doctrine. It is noteworthy that while the companies in these cases were in widely differing financial circumstances—and it would seem that the different debt securities involved would have different values depending on the investment characteristics of the securities and financial condition of the issuer—in not a single one of these cases was the retirement made either above or below principal amount, but in each case exactly at principal amount.

In Re Cities Service Co. (1944) 53 PUR(NS) 225, Holding Company Act Release No. 4944, the Commission approved the retirement of a 5½ per cent debenture issue of Cities Service Power & Light Co. by a cash payment of principal and, *at the same time,* the Commission also approved the retirement of that company's $5, $6, and $7 preferred stocks at par. Observance of the majority's valuation principles would surely have demanded some variation in the treatment accorded the several issues in view of these different interest and dividend rates. The Commission opinion does not even refer to the problem, let alone consider it. The rights and the risks of these securities were not alike, consequently their investment values could scarcely be alike. Under a consistent application of the present worth doctrine, the inevitable result is that a security may be retired *below* face amount or par as well as above that amount, depending on the particular situation. To me one of the strongest pieces of evidence that the doctrine of the majority opinion is not sound is its failure to face squarely the problems involved in a consistent application of its doctrine in those cases in which the result would be a payment of less than par or face amount. It should be observed, moreover, that thus far the Commission opinions have considered only the propriety of paying more than principal amount. In none of the cases has the Commission stated that it was considering, nor has it in fact considered, the equally important question, under the majority's present ap-

[18] As shown in footnote 16, *supra,* these data were referred to in the Commission's brief.

proach, whether the retirement should have been made at less than that amount. Inquiry stopped once it was determined that no premium was payable. Consistent application of the valuation theory would have required that the inquiry be pursued further to the extent of determining whether the securities were clearly worth their principal so as to make the payment of that amount not unfair to the stockholders. A brief reference to some of those cases will show that in the light of the factors expressly mentioned by the Commission the present value of the securities involved was clearly less than face amount, or there was such substantial doubt as to whether they had that worth, that the Commission should have considered the question.

In Re North Continent Utilities Corp. (1943) Holding Company Act Release No. 4686, the Commission held fair and equitable the retirement of a 5½ per cent bond issue by a payment of principal, notwithstanding its finding that:

"The meager earnings coverage of its bond interest, the market history of such bonds [i. e., from a low of 30 in 1938 to a high of 86 in 1943, and 73½ immediately prior to the filing of the plan in 1943] and the uneconomic combination of properties in its system, make it improbable that the company would be able to refund such bonds at maturity [in 1948]" and "North Continent appears to be faced with the economic necessity of liquidating its investments for the purpose of paying off its bonds or else going into bankruptcy at or prior to the maturity of such bonds."

In Re Laclede Gas Light Co. (1944) 56 PUR(NS) 321, 326, 346, Holding Company Act Release No. 5062, which is presently pending in the circuit court of appeals for the eighth circuit, the Commission approved a plan providing for the discharge, by the payment of principal, of the company's "1904" bonds due April 1, 1934, and extended until April 1, 1945, and its 5½ per cent "1919" bonds, series C and D due 1953 and 1960, which were collateralized with "1904" bonds. The Commission in its findings stated:

". . . unless Laclede Gas is able in 1945 to secure additional maturity extensions, it will then face the necessity of refunding its entire outstanding debt . . . or going into bankruptcy. The record indicates that, . . . such refunding would not be possible marketwise. . . . It appears, therefore, that bankruptcy looms as a serious possibility for investors in Laclede Gas. . . .

. . . . . .

"The 1919 bonds are speculative in caliber and are rated only C1+ by Standard and Poor's Corporation. The company received only 91.45 per cent of principal amount on the sale of the series C bonds and 95 per cent on the sale of the series D bonds, and both series have sold on the market at prices substantially less than principal amount during most of the intervening years. In 1931 the series C bonds sold as low as 62 and the series D as low as 65; as recently as 1940, both series sold as low as 38. Payment of principal amount and accrued interest is *adequate* compensation for the claim of these bonds in view of the relatively small margins by which the claims are covered, and the substantial risks involved." (Italics added.)

It should be noted that the Commission found that the payment of principal was "adequate." In other words, the payment was sufficient. It did not have to be more. The question of whether it was more than sufficient was ignored, although assuming the valuation approach there was ample basis in the facts of the case for believing it was.

In Re Central States Utilities Corp. Holding Company Act Release No. 5351, Oct. 13, 1944, the Commission, in approving the retirement of a 5½ per cent bond issue due 1953, found:

"Central States' 5½ per cent bonds have for years been considered of a speculative caliber. They are today rated only B by Moody's Investors Service, and at no time during the past ten years have they been rated higher than Ba. Over the 10-year period 1934 through 1943, Central States' over-all consolidated fixed charges were covered fully in only two years (1940 and 1943) and even then with only small margins to spare. It is to be noted that in one of such full-coverage years (1.27 times in 1943) no provision was made for interest on the Central States' 5 per cent debentures held by [its parent]. . . . Interest requirements on the bonds alone, through the 10-year period mentioned above, were covered an average of 1.54 times, the lowest and highest annual coverage being 1.35 times in 1938 and 1.91 times in 1940, respectively.

"Such record of coverage of interest and over-all charges, among other factors affecting the investment status of Central States' 5½ per cent bonds, has been clearly reflected in their market history. When the last public offering of bonds was made by the company in 1930, the price to the public was 90 per cent of par and the bonds have sold on the market at prices substantially less than par during most of the intervening years. In 1932 the bonds sold as low as 20 and as recently as 1940 they sold as low as 64½. . . . Accordingly, we are of the opinion that payment of the unpaid principal amount and accrued interest is *adequate* compensation for the claims of these bonds." (Italics added.)

Here again, whether the bondholders were being given too much was not considered, nor was the issue even mentioned.

As elsewhere stated, in my opinion requiring American to pay more than face amount is unfair to the holders from whom American has repurchased debentures on the basis of tenders or open market purchases with the approval of this Commission.

On February 22, 1943, the Commission authorized American to expend up to $10,000,000 of its cash in the purchase of its debentures at prices not less than 95 per cent nor more than 100 per cent of the principal amount. This authorization was later modified and extended so as to permit American to pay a price not in excess of 106 per cent of principal amount, the excess over 100 per cent representing, in the opinion of American, an amount which would be less than the interest which would accrue during the period before American could effect compulsory retirement of all the debentures under the act. Pursuant to our orders American acquired from March 12, 1943, to July 31, 1944, debentures in the principal amount of $8,336,300

at a cost, exclusive of brokerage fees, of $8,573,826 or an average price of 102.85.

An examination of the Commission's opinions dealing with this acquisition program, and the letters used by American with the approval of our Public Utilities Division to solicit the debenture holders in connection therewith, impels the conclusion that the debentures would not be retired at more than face amount. In other words, the debenture holders who sold their bonds were led to believe, on the basis of implicit representations made by the Commission, and by American with our staff's acquiescence, that face amount would be the ceiling when the bonds were retired.

In its findings and opinion of February 22, 1943,[19] the Commission, in approving the acquisition program, stated:

"We have indicated above the difficulties in the way of arriving at a precise valuation of American's assets. However, there is reason to believe, on the basis of presently available information that American's debentures are fully covered and it therefore appears that debenture holders who elect to retain their holdings have reasonable assurance that the assets and earnings of American are adequate to satisfy their prior claims.* In view of the foregoing it cannot be said that holders who elect to sell would be doing so under circumstances not affording them a clear alternative choice.

"As we pointed out earlier herein the debentures have sold below 90 in only two months during the past three years, and in recent months prices have remained generally above 95. On February 16, 1943, the closing price on the New York Curb Exchange for the American debentures was 99½ and for the Southwestern debentures, 99. In view of recent market prices of the debentures, and in view of the alternative open to the debenture holders as referred to in the above paragraph, we do not feel that purchases by the company at current prices would be unfair to the debenture holders. Nor in view of current market prices do we deem it necessary to determine at precisely what point such purchases might become unfair. In lieu of such a determination, we shall condition our order so that purchases may not be made at prices of less than 95 per cent of principal amount (exclusive of accrued interest) without further order of the Commission. *In this connection it is relevant to note that in the present proceeding American's president testified that the company in no event proposes to pay a premium on any debentures purchased or retired so long as our order for dissolution stands.*[25]

"[25] In Re The United Light & P. Co. (1942) Holding Company Act Release No. 3345, 10 SEC 1215, 42 PUR(NS) 193, we held that a holding company subject to an order for dissolution was not required to pay a premium on debentures retired as a step in compliance with such order when dissolution pursuant to such an order was not a contingency contemplated by the contract under which the debt securities had been issued. Our order has been reviewed and affirmed. Re The New York Trust Co. v. Securities and Exchange Commission (1942) 46 PUR(NS) 270, 131 F2d 274. Neither the American nor Southwestern debenture agreement defines the rights of debenture holders in either voluntary or involuntary liquidation."

"In fixing a price below the full

[19] Re American Power & Light Co. Holding Company Act Release No. 4133.

* In a number of references in the opinion to this claim it was stated at principal amount.

principal amount at which purchases may not be made without further order of the Commission we have considered that American is a company subject to an order of dissolution, even though such order is being appealed. Under all the circumstances, we do not feel that open market purchases will be unfair to debenture holders who, having been advised of the possible alternatives, elect to sell at this time." (Italics added.)

The foregoing quotation indicates quite clearly that the "clear alternative choice" given the debenture holders consisted of selling at a price not less than 95 or waiting until liquidation or other action by the Commission and receiving 100. Nowhere in this opinion was any mention or intimation made of the possibility that the company might be required to pay more than face amount. Moreover, the opinion makes specific reference to the testimony of American's president that "the company in no event proposes to pay a premium on any debentures purchased or retired so long as [the] order for dissolution stands" and refers to the Commission's holding in the United Light & Power Case, *supra,* that no premium is payable in the case of a compulsory retirement of debt securities. If the Commission thought that under certain circumstances American would be required to pay more than principal amount it should have stated so. Pointing out the testimony of American's president, and referring to our decision in the United Light & Power Case, strongly implies that the Commission did not differ with the viewpoint expressed by American's president.

The order approving the purchase program required American to send a letter to all the debenture holders notifying them of the proposed program and to include with the letter a copy of tht Commission's opinion. It further required the company to clear the letter with the Public Utilities Division prior to its release. Acting pursuant to our order American, in a letter of March 1, 1943, which it cleared with our staff, solicited the debenture holders for tenders. The Commission's opinion was appended to the letter and the security holders were referred to it "for information to be considered by them in determining whether to sell or to retain their debenture bonds."

Upon the announcement of the purchase program the market price for the debentures moved slightly over par, so that the company was unable to carry through the program successfully. American, therefore, applied to us for approval to pay up to 106, the excess over face amount to represent interest which would otherwise accrue on the debentures to the date when it would be possible for the company, under a § 11(e) plan, to retire the debentures at principal amount. On August 10, 1943, the Commission approved American's request, and American, in a letter of August 19, 1943, which was cleared with our staff, again solicited its debenture holders. The letter contained, inter alia, the following extracts from the Commission's findings:

"The American debentures under the debenture agreement are redeemable on any interest date, but only if the entire issue is redeemed, at 110 per cent of principal amount plus accrued interest. The Southwestern Debentures, under the debenture agree-

ment, are redeemable on any interest date after February 28, 1947, in whole or in blocks of not less than $1,000,000 at 110 per cent of principal amount plus accrued interest. *The president of American testified that so long as our order for dissolution stands the company does not propose to pay a premium on any debentures purchased or retired.* Another witness for the company testified that the company considered any amount paid in the purchase of debentures at prices in excess of par under the present program to be the 'anticipation of an interest expense' rather than the payment of a premium. Neither the American nor the Southwestern debenture agreements define the rights of debenture holders specifically in terms of liquidation pursuant to an order issued under the Holding Company Act. Apparently relying upon our decision in the case of The United Light & Power Company[6] the president of American stated that when and if the validity of our dissolution order is sustained the company proposed to apply to the Commission for permission *to retire its debentures at par* without the payment of a premium either through the payment of cash or distribution of securities in American's portfolio. The time at which American may be able to retire its debentures in accordance with the foregoing plan is the date to be estimated by American in determining whether it can effect savings by purchasing its debentures at certain prices in excess of par rather than by paying interest at the rate of one-half per cent per month (6 per cent per annum) to such estimated time.

[6] We there held that United then subject to an order of dissolution which order had become final was not required by its contract to pay a premium on its debentures retired as a step in compliance with such order. Re The United Light & P. Co. Holding Company Act Release No. 3345, *supra*. Our order has been reviewed and affirmed. The New York Trust Co. v. Securities and Exchange Commission, *supra*; see also: Re North American Light & P. Co. (1942) Holding Company Act Release No. 3658, 11 SEC 820, affirmed in City Natl. Bank & Trust Co. of Chicago v. Securities and Exchange Commission (1943) 48 PUR(NS) 195, 134 F2d 65."

"Conclusions

"Whether American will effect interest savings under the proposed modified program will, of course, depend upon the prices it pays for the debentures and whether and when the debentures will be dischargeable at par. While the management admits that neither of these factors is susceptible of determination at this time, it is of the opinion that such savings can be obtained by the exercise of sound discretion. The debenture holders will of course continue to have a fair and reasonable choice of selling or retaining their debentures and the savings, if any, will increase the assets available for distribution to the company's stockholders, ..." (Italics added.)

Here again there was no clear reference to the fact that the debentures might be retired at more than face amount. Although it is true, that there was a passing reference "to whether and when the debentures will be dischargeable at par," I think that the debenture holders, in the light of the other statements in the quotation and the Commission's precedents, would hardly have been put on notice that there was even a possibility of retiring the securities at more than face amount.

The Commission from time to time

extended its authorization for purchases, and in a series of later letters, which were cleared with our staff, American continued soliciting tenders from the debenture holders.

A letter dated October 22, 1943, reads in part as follows:

"On October 20, 1942, the company petitioned the United States circuit court of appeals for the first circuit for a review of the order of the Securities and Exchange Commission requiring the dissolution of the company. After that court hands down its decision, it is likely that the proceeding will be carried to the Supreme Court of the United States by the losing party. In the event that the final decision in this review proceeding upholds the constitutionality of § 11 of the Public Utility Holding Company Act, *the Company expects to apply to the Securities and Exchange Commission for an order under which the debenture bonds may be retired at 100,* either through the payment of cash or distribution of securities held by the company.

"The company has estimated that in such event the debenture bonds may be retired at 100 about September 1, 1944. Accordingly, the amount in excess of 100 which the company intends to pay for its debenture bonds under this order is limited to the amount of interest which it would have to pay on those bonds from the date of purchase to September 1, 1944. . . .

"If for any reason the company should hereafter conclude that the bondholders may be required to surrender their debenture bonds at 100 at an earlier date than September 1, 1944, then the maximum purchase prices to be paid by the company would be correspondingly reduced from the schedule of prices now contemplated." (Italics added.)

Similarly, on December 16, 1943, the company sent a letter to its debenture holders stating, inter alia:

"The company is permitted to pay an amount in excess of 100 for the debenture bonds, but such excess is limited to the amount of interest which may accrue from the date of purchase to the date the company estimates that it may be able *to require holders of debenture bonds to surrender their bonds at 100.* The company, in addition, pays the interest accrued to the date of purchase.

"The company has estimated that, in event the constitutionality of § 11 of the Public Utility Holding Company Act is upheld on final adjudication of the company's appeal from the order of the Securities and Exchange Commission requiring the dissolution of the company, *the debenture bonds may be retired at 100* about September 1, 1944. Accordingly, the amount in excess of 100 which the company intends to pay for debenture bonds under this order is limited to the amount of interest which it would have to pay on those bonds from the date of purchase to September 1, 1944." (Italics added).

Finally, on July 13, 1944, American sent a letter to its debenture holders which read in part as follows:

"In view of the dissolution order and since one necessary step in carrying out an order of dissolution of a company is discharge of its debt, the company has felt obligated to file, and has filed, with the Commission a plan for retirement of the debenture bonds of the two issues named above. *Under the Commission's decisions no call pre-*

mium, as such, is payable upon such retirement of bonds. The company believes that under the circumstances relating to these debenture bonds and under the decisions of the Commission, the debenture bonds should be retired by payment of the principal amount thereof and unpaid interest accrued to the date of payment, and the company has accordingly provided in the plan for the payment of that amount. . . .

"Meanwhile the company is authorized, by orders of the Securities and Exchange Commission dated February 22, 1943, August 10, 1943, December 9, 1943, and April 18, 1944, to purchase debenture bonds of both issues to and including August 10, 1944. . . . These orders permit the company to pay an amount in excess of 100 for the debenture bonds, but such excess is limited to the amount of interest which may accrue from the date of purchase to the date the company estimates it may be able *to require holders of debenture bonds to surrender their bonds for payment at 100.* . . .

"The company now estimates that, if its plan for retirement of all the debenture bonds is approved by order of the Commission and enforced by an order of the United States district court, the company will be able *to require holders of debenture bonds to surrender their bonds at 100* (and accrued unpaid interest) not later than December 1, 1944. Consequently, the amount in excess of 100 which the company intends to pay for debenture bonds under this purchase program is limited to the amount of interest which it would have to pay on the debenture bonds from date of purchase to December 1, 1944. . . . If the company should hereafter conclude that holders of debenture bonds may be required to surrender their bonds at 100 at an earlier date than December 1, 1944, then the maximum purchase price which would be paid by the company would be correspondingly reduced. . . .

"The advantages to the holder of a debenture bond who sells his bond pursuant to this offer of the company are that (a) *he will receive at the time of sale approximately the same amount of money that he would receive if he retained his debenture bond and it was paid thereafter at par and accrued interest* about December 1, 1944, pursuant to the plan, . . ." (Italics added.)

To summarize: The opinions of the Commission, and the letters sent by American to the debenture holders after clearance with our staff as directed by our opinions, all suggest that the retirement of the debentures would be made at their principal amount. Both the opinions and the letters refer to the company's expectation that it would in due course apply to the Commission for retirement of the debentures at face amount. The possibility of a retirement at a higher amount was not pointed out as it should have been if the debenture holders were to be advised fully of the alternative choices they had. In fact it seems to me the intimations were exactly to the contrary. I submit that it is unfair to these holders who sold their debentures on the basis of these representations to require American to retire the remaining debentures at an amount higher than principal.

V

I realize that the debt in this case now enjoys a favorable position. I am also willing to assume (although I think it is immaterial) that, on the basis of its present assets and earnings, American could doubtless sell at par a bond issue equal in amount to the present debt at a lower coupon and lower effective rate than 6 per cent. However, in determining whether it is fair and equitable to pay the debt holders a premium, under the majority's approach, it seems to me most important to inquire how long this condition has existed, how it was attained, and just how confident one can be that it would continue to the maturity of the debt.

The debentures were originally sold to the public at various discounts ranging up to 7 per cent. American realized an average price of only 91.36 per cent of the principal amount.[20] In other words, the borrower and the lenders at the time of issuance appraised the risks attending the loan and in the light of the then level of interest rates bargained out an effective interest rate of more than 6 per cent, made up of the 6 per cent coupon and the discount, which is now almost universally recognized as being deferred interest payable as part of the principal amount when the latter falls due at its maturity. These debenture holders under American's plan are to receive this deferred interest long before it is due, long before the debt holders are otherwise entitled to it—a point to which the majority opinion gives no attention. As time has passed, the position of the company has improved. The assets coverage—thanks in part to the withholding of dividends (about which I shall say more later)—has improved as has the earnings coverage. The result is, as the majority suggest, that the risks attending the loan are much less now than when it was made.[21] This is certainly not a reason for paying the creditors less interest. It should not be used as a reason for paying them more than the principal of the debt. The creditors have continued to receive their interest in full. Indeed, the 6 per cent interest they are receiving now overcompensates them not merely because the risk factor has decreased, as the majority hold, but also because interest rates have declined.[22] These facts, under the majority theory however, do not redound

[20] American assumed all of Southwestern's liabilities, including its $5,000,000 outstanding debentures, in 1930. More than half of these debentures were sold to the public in 1922 at 89 and the balance in 1925 at 91½, with the company receiving 81¼ and 86¼, respectively, after paying underwriting commissions.

Of the total discount and expenses of issue, $2,436,763 is still reflected in the balance sheet as unamortized discount.

[21] The most important time for appraising risk and arriving at interest and discount rates is when the investor hands his money over to the borrower.

[22] The debenture contract has seventy-one years to run, as the majority point out, and under their approach they would discount the $60 annual interest payments and the principal amount payable at maturity at an interest rate indicated by the current money market. I think that one important defect of this process is the failure to give consideration to the fact that interest rates are not static. Thus present interest rates are low in comparison with those of fifteen or twenty years ago and, as far as we can anticipate, they may prove to be low in comparison with those that will prevail fifteen or twenty years from now. The method followed by the majority is roughly equivalent to finding the present worth of the right to receive $1,000 in 2016 and interest at 6 per cent in the meantime by using a 5.43 per cent discount factor, the result being 110 per cent of principal or $1100 per debenture. If the present worth were computed by using a 6 per cent discount factor, the interest rate agreed upon by the parties, it would be $1,000 per debenture.

to the benefit of the company and its stockholders, but are now used to their detriment by making them the basis for assessing a 10-point penalty against them upon the payment in full of a debt which was issued at a discount and which the company now pays because it must. This seems to me unfair and illogical.

Since issuance, the debentures have had a checkered career in the market and somewhat speculative quality ratings.[23] They sold as low as 32½ in 1933 and down to 86½ as recently as 1942. Moreover, from 1929 through 1944 total trading volume on the New York Curb Exchange alone in the two debenture issues aggregated $107,280,000 (more than twice the size of the original issue) and the weighted average market price was 89.26.[24] In other words, not only did the original purchasers of the debentures pay less than principal amount, but in the fifteen years ending December 31, 1944, the average market price on actual transactions, involving more than twice the amount of the original issue, was substantially less than 100.

In contrast to the past, it must in fairness be admitted that the debentures are now much more attractive securities. This is attributable to the 6 per cent coupon in relation to present low-interest yields, the improved condition of the company and its subsidiaries and the company's strong current position. The credit position of the debentures has also undoubtedly improved as a result of the company's debt purchase program.

In the light of our dissolution order, however, the explanation of the current market premium for the debentures is more conjectural. I suspect there are many investors who in these days of low yields are willing to pay a premium for a short-term 6 per cent investment and some who, on the basis of our decision in the Standard Gas Case (1945) 61 PUR(NS) 175, 151 F2d 326, may have been speculating on the possibility of a distribution of portfolio securities to the debt holders. Again, some purchasers may have gambled on the possibility that the company might upset our dissolution order and on the further possibility that, if it did, the debentures might either be allowed to remain outstanding or be retired at a premium. Nevertheless it is clear that everybody who bought debentures after our dissolution order did so on full notice of the precedents which, as I have shown, clearly pointed to retirement at their face amounts.

As I mentioned earlier, it is important to bear in mind that the present improved investment value of the debentures is attributable to a substantial degree to sacrifices on the part of American's stockholders since 1932. Thus, since that date, no dividends have been paid on the common stock. In the same period partial dividends were paid on the preferred stock until the date of our dissolution order, and thereafter none at all. At December 31, 1944, dividend arrearages on the $6 preferred shares were $37.57½ per share and on the $5 preferred, $31.31¼ per share. Aggregate arrearages were enormous,—over $60,450,000. By this policy of retaining earnings, corporate earned surplus has been built up to about $37,885,000 and consoli-

[23] See Appendix II. [Omitted herein.]
[24] According to the uncontested testimony of Paul B. Coffman, a witness for American.

dated earned surplus to approximately $83,767,000. It will be noted that net current assets at December 31, 1944, amounted to $35,649,000 on a corporate basis and to about $72,600,000 on a consolidated basis. It seems apparent that the strong current position which the majority opinion relies on heavily in arriving at its decision mainly resulted from the retention of earnings. To whatever extent the present strong position of the debt is attributable to earnings and assets coverages that exist because of past sacrifices on the part of the stockholders, it seems to me wholly unfair and inequitable now to penalize them further for this conservatism by requiring them to pay a premium to the debt holders whose contract has been punctually observed at all times. "From him that hath not shall be taken away even that which he hath."

VI

Although, in my opinion, the proposal to pay principal amount and accrued interest is fair and equitable, I cannot approve the plan as it now stands, because of the arrangement it provides for reinstating the debentures in the event that the constitutionality of § 11 and our order directing the dissolution of American are not upheld by the Supreme Court.

The plan provides that, upon the surrender of the debentures to the trustees, the holders will be paid the principal amount of such debentures plus accrued interest. At the same time they will be given a nontransferable, non-negotiable certificate entitling them to reinstate the debentures upon the payment of principal amount plus accrued interest from the last preceding semiannual interest date if our order of dissolution is held invalid. Further American will stipulate, if so required by the Commission, that it will set aside in a separate fund the principal amount repaid to it upon the reinstatement of the bonds and will employ this fund only for the retirement of the debentures unless otherwise ordered.

To me, all this is a "Rube Goldberg" device. It makes the debt a financial zombi, neither dead nor alive.

The certificates have many defects. Some investors will not fully understand their right to reinstate the bonds by the payment of principal and interest if American is successful in its appeal. Others, particularly those of small means, may not have the money required to reinstate the bonds. Those that do, may have it only because they did not put to use the cash they received on the surrender of the debentures, planning to await the outcome of American's appeal. Under such circumstances, the investor will have received no return on his money from the time the debentures are surrendered until they are reinstated, since American, under this scheme, has no obligation to pay interest during this period. Further, the device may create undue tax complexities for the debenture holders who would be subject not only to the tax effects of having the debentures redeemed but also to the uncertainty of any further tax effects that may arise upon reinstatement of the debentures. Finally, the certificates will inject a complication into the security structure of the company. In its future balance sheets, American would have to disclose clearly the contingency of reinstating

the debentures. I think the certificates serve no useful purpose. They would be unnecessarily troublesome to the investors. They exist only because American wants to ride two horses going in opposite directions.

Accordingly, I cannot vote for the plan as it stands. It seems to me a more appropriate means can be found to provide for the contingency that the debentures will not be considered by the courts to have been involuntarily retired.

Supplemental Findings

On October 31, 1945, the Commission issued its findings and opinion disapproving a plan filed under § 11 (e) of the Public Utility Holding Company Act of 1935 by American Power & Light Company ("American"), a registered holding company, which plan provided for the retirement of American's outstanding 6 per cent gold debenture bonds, due 2016, and Southwestern Power & Light Company's ("Southwestern") 6 per cent gold debenture bonds, due 2022 (assumed by American) at 100 per cent of principal amount plus accrued interest.[1] We held that the retirement of American's debt, which was required by § 11(b) of the act,[2] was not at the option of the company within the meaning of the applicable indentures and, therefore, the call premiums as such were not payable. We also held that the debenture holders were entitled to receive the quitable equivalent of their rights measured apart from the impact of § 11 and found that, after giving consideration to all the evidence, the equitable equivalent of the American debentures is 110 per cent of principal amount plus accrued interest, the ceiling in view of the fact that American could elect to call these debentures at 110. We, therefore, concluded that fair and equitable standards of § 11(e) required that holders of the American debentures should receive 110 plus accrued interest.

We did not reach a conclusion with respect to the precise amount—in no event less than 110—which the holders of the Southwestern debentures should receive, for the reason that such debentures were not callable until March 1, 1947, and the fair and equitable treatment of these debenture holders could only be determined when the approximate date of payment could be estimated.

We entered no order with respect to the plan but provided that if within thirty days from the date of our findings and opinion the plan was not amended in accordance therewith, an order would be entered disapproving the plan.[3]

American filed with the Commission on November 7, 1945, an amended plan which provides for the retirement of the American debentures at 110 per cent of principal amount plus accrued interest. The amended plan further provides for the retirement of the Southwestern debentures at 110 per cent of principal amount plus accrued interest and, in addition, pro-

[1] Re American Power & Light Co. Holding Company Act Release No. 6176, 61 PUR (NS) *ante*, p. 129.

[2] See Re Electric Bond & Share Co. (1942) 11 SEC 1146, 46 PUR(NS) 321; aff'd (1944) 53 PUR(NS) 16, 141 F2d 606; cert. granted (1945) — US —, 89 L ed —, 65 S Ct 1400.

[3] Commissioner Healy dissented from this decision. For the respective views of the majority of the Commission and Commissioner Healy, see Re American Power & Light Co. *supra*, note 1.

vides that the holders of the Southwestern debentures are to receive receipts (nontransferable except by operation of law) evidencing American's agreement to file, within sixty days from November 7, 1945, a supplemental plan providing for the deposit by American with the trustee for the Southwestern debentures of such additional amount as the Commission shall find to be fair and equitable on account of the fact that the Southwestern debentures are not callable until March 1, 1947.

American has requested the Commission, pursuant to the provisions of § 11(e) of the act, to apply to an appropriate district court of the United States in accordance with the provisions of § 11 (e) and § 18 (f) to enforce and carry out the terms and provisions of the amended plan.

Necessity and Fairness of Amended Plan

As pointed out in our findings and opinion of October 31, 1945, *supra,* we have no difficulty in finding that a fair and equitable plan for retirement of the American and Southwestern debentures is necessary to effectuate the provisions of § 11(b) of the act. Even apart from our dissolution order the requirements of §§ 11(b) (1) and 11 (b) (2) as to American clearly necessitate the retirement of its outstanding debentures.

The amended plan provides for retirement of the American debentures at 110 per cent of principal amount plus accrued interest. This accords with our views with respect to the amount which should be paid the American debentures as expressed in our previous findings and opinion. We, therefore, find that such proposed treatment of the American debentures is fair and equitable to the holders of such debentures.

As has been noted, the amended plan provides for retirement of the Southwestern debentures at 110 per cent of principal amount and in addition such amount as the Commission shall find fair and equitable on account of the fact that the Southwestern debentures are noncallable until March 1, 1947, at which time such debentures are callable at 110. Thus, it appears that adequate provision is being made to assure that the holders of the Southwestern debentures will receive the full equivalent of their rights. Accordingly, we find that such proposed treatment of these debentures is fair and equitable to the security holders affected thereby.

Conclusions

We find that the amended plan is necessary to effectuate § 11 of the act and is fair and equitable to the persons affected thereby. We grant applicant's request that the Commission apply, pursuant to the applicable sections of the act, to an appropriate district court for an order enforcing and carrying out the terms and provisions of the amended plan. Our order herein will not be operative to authorize consummation of such amended plan until such a court order enforcing the amended plan has been entered.

American has requested us to make the appropriate recitals in our order for the purpose of the requirements of the Internal Revenue Code including Supplement R thereof with respect to the proposed expenditure of funds necessary for the retirement of the American and the Southwestern debentures. Since, as set forth above,

we have found that the proposed retirement is necessary to effectuate the provisions of § 11 (b) of the act, we shall grant the request.

In our earlier findings and opinion we denied American's application (consolidated with proceedings with respect to the plan) for a further extension of its authorization to purchase debentures in the open market, but no order thereon has as yet been entered. American now requests permission to withdraw such application and our order will so provide.

An appropriate order will issue.

Supplemental Findings

On November 8, 1945, 61 PUR (NS) *ante*, p. 171, the Commission issued its findings and opinion approving an amended plan filed on November 7, 1945, under § 11 (e) of the Public Utility Holding Company Act of 1935 by American Power & Light Company ("American"), a registered holding company, which plan provided for the retirement of American's outstanding 6 per cent gold debenture bonds, due 2016, at 110 per cent of principal amount plus accrued interest. The amended plan further provided for the retirement of Southwestern Power & Light Company's ("Southwestern"), 6 per cent gold debenture bonds, due 2022 (assumed by American) at 110 per cent of principal amount plus accrued interest and, in addition, provided that the holders of the Southwestern debentures were to receive receipts (nontransferable except by operation of law) evidencing American's agreement to file, within sixty days from November 7, 1945, a supplemental plan providing for the deposit by American with the trustee for the Southwestern debentures of such additional amount as the Commission shall find to be fair and equitable on account of the fact that the Southwestern debentures are not callable until March 1, 1947.[1]

Pursuant to American's request and in accordance with the provisions of §§ 11 (e) and 18 (f) of the act the Commission instituted proceedings to enforce the amended plan in the United States district court for the southern district of New York which court on November 28, 1945, entered its order of approval and enforcement. The order of the district court provides that on December 13, 1945, after American has deposited the funds with the respective trustees for the payment of 110 per cent of principal amount to the holders of the American and the Southwestern debentures as provided in the amended plan, interest shall cease to accrue on the American and Southwestern debentures and American shall be discharged from any obligation or liability thereon, except only the obligation represented by the receipts issued or issuable to the holders of the Southwestern debentures as provided in the amended plan.

[1] On October 31, 1945, 61 PUR(NS) *ante*, p. 129, the Commission approved American's § 11(e) plan, which provided for the retirement of the American and the Southwestern debentures at 100 per cent of principal amount plus accrued interest, as unfair to the debenture holders. The Commission held that the equitable equivalent of the American debentures is 110 per cent but did not reach a conclusion with respect to the precise amount—in no event less than 110 per cent—which the holders of the Southwestern debentures should receive by reason of not being callable until March 1, 1947. Re American Power & Light Co. Holding Company Act Release Nos. 6176, 6201 (printed herewith), enforced in Re American Power & Light Co. (US Dist Ct SD, NY) November 28, 1945.

American has filed with the Commission a supplemental plan and amendment thereto which is designed to fix the amount, in addition to 110 per cent of principal amount, to be paid to the holders of the Southwestern debentures.

American proposes to pay to the holders of the Southwestern debentures, in addition to 110 per cent of principal amount and accrued interest payable under the amended plan described above, 5 per cent of principal amount as the amount which the Commission should determine to be fair and equitable.

American has requested the Commission, pursuant to the provisions of § 11 (e) of the act, to apply to an appropriate district court of the United States in accordance with the provisions of §§ 11 (e) and 18 (f) to enforce and carry out the terms and provisions of the supplemental plan as amended.

A public hearing was held after appropriate notice and having considered the record we make the following findings:

Fairness of Supplemental Plan

We have already found, in our findings and opinions of October 31, 1945, and November 8, 1945, *supra*, that a fair and equitable plan for the retirement of the Southwestern debentures is necessary to effectuate the provisions of § 11 (b) of the act. Consequently, the only issue before us is whether the proposed payment of an additional 5 per cent of principal amount to the holders of the Southwestern debentures is fair and equitable.

The company states that, absent the compulsory retirement of the Southwestern debentures under § 11 they might be regarded, in view of the face interest rate of 6 per cent, as almost certain to be called on March 1, 1947 and accordingly might be treated in the market as a short term security. This appears reasonable to us and, accordingly, we must view the rights of the Southwestern debenture holders in the light of the fact that they hold a debenture bearing 6 per cent interest although the risks attached to their security are those appurtenant to a short-term security of American. The proposed payment of 5 per cent of principal amount is designed to compensate for the difference between the value of the right to receive the interest rate of 6 per cent and the interest rate justified by a short-term security of American.

In light of the foregoing we conclude that the proposed treatment of the Southwestern debentures is fair and equitable to the security holders affected thereby.

Conclusions

We find that the amended supplemental plan is necessary to effectuate § 11 of the act and is fair and equitable to the persons affected thereby. We grant applicant's request that the Commission apply, pursuant to the applicable sections of the act, to an appropriate district court for an order enforcing and carrying out the terms and provisions of the amended supplemental plan. Our order herein will not be operative to authorize consummation of such amended supplemental plan until such a court order enforcing the supplemental plan, as amended, has been entered.

American has requested us to make

the appropriate recitals in our order for the purpose of the requirements of the Internal Revenue Code including Supplement R thereof, with respect to the proposed expenditure of additional funds pursuant to the amended supplemental plan. Since, as set forth above, we have found that the amended supplemental plan is necessary to effectuate the provisions of § 11 (b) of the act, we shall grant the request.

An appropriate order will issue.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

Re Standard Gas & Electric Company

Nos. 8885, 8906, 8934
151 F2d 326
September 14, 1945

APPEAL *from judgment requiring cash payment upon cancellation of notes and debentures in reorganization under Holding Company Act, wherein cross appeals were filed; judgment reversed and case remanded. For lower court decision, see (1945) 58 PUR(NS) 278, 59 F Supp 274.*

Corporations, § 10 — Powers of Securities and Exchange Commission — Reorganization — Creditor rights.

1. The Securities and Exchange Commission has power to order distribution in kind to note and debenture holders of a holding company, in a reorganization proceeding under § 11(b) of the Holding Company Act, 15 USCA § 79k(b), instead of ordering a sale of corporation assets and payment in cash, p. 177.

Appeal and review, § 15 — Commission order.

2. The action of an expert administrative body in determining the particular remedial measures demanded in an individual case is not to be overturned by court action unless the administrative body has lost sight of the law, p. 180.

Appeal and review, § 28.9 — Federal Commission order — Reorganization of holding company.

3. The district court, in reviewing action of the Securities and Exchange Commission relating to reorganization of a holding company, may not substitute its notion of practical expediency for that of the Commission, since the wide grant of power given by Congress to the Commission in the Holding Company Act carries with it the authority to fix the form of reorganization of the holding company, subject to court control only if the Commission departs from the law, p. 180.

Security issues, § 5.1 — Redemption of notes and debentures — Premium — Holding company reorganization.

4. Holders of notes and debentures to be liquidated pursuant to reorgani-

zation under the Holding Company Act are not entitled to the call premium specified in the contract between the holding company and such holders," p. 182.

APPEARANCES: David K. Kadane, of Philadelphia, Pa., for SEC; A. Louis Flynn, of Chicago, Ill., for Standard Gas & Electric; Thomas O'G. Fitzgibbon, of New York city, for Guaranty Trust Co.; Spencer Pinkham, of New York city, for Union College et al.; Albert J. Fleischmann, of Baltimore, Md., pro se.

Before Miller,* Goodrich, and McLaughlin, Circuit Judges.

GOODRICH, CJ.: In the reorganization of Standard Gas Corporation under the Public Utility Holding Company Act [1] a plan which was the resultant of suggestions by the Company's management and further suggestions by the Securities and Exchange Commission was approved, as finally amended, on November 15, 1944. The Commission then brought proceedings pursuant to § 11(e)[2] of the act in the district court for the district of Delaware to secure approval of the plan.[3] The plan was a reorganization measure, designed as part of an effort to simplify the general corporate structure of Standard Gas. To the extent that it concerns us, it provided for cancellaton of the notes and debentures in the ratio of $304.95 in cash plus $690 worth of stocks [4] to be distributed from the company

* Judge, United States Court of Appeals for the District of Columbia, sitting by assignment of the Chief Justice of the United States, pursuant to the provisions of the act of December 29, 1942, entitled "An Act to amend the Judicial Code to authorize the Chief Justice of the United States to assign circuit judges to temporary duty in circuits other than their own."

[1] Act of Aug. 26, 1935, Chap 687, Title I, § 33, 49 Stat 838, 15 USCA § 79–79z—6; 15 USCA § 79k in particular.

[2] 15 USCA § 79k(e).

"In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for the other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of § 79r of this chapter, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

[3] The plan is fully set out in the findings and opinion of the Commission of Nov. 15, 1944, 57 PUR(NS) 321; Holding Company Act Releases Nos. 5430 and 5070.

[4] The stocks distributed were especially selected on the basis of comparative amount and constancy of yield. They represented the cream of the portfolio. Thus while a 30 per cent decline in consolidated gross income would wipe out earnings on debentures it would necessitate a 35 per cent drop to achieve the same result in the distributable stocks. The stocks chosen and the mode of apportionment are as follows:

portfolio plus a market fluctuation differential now fixed at $5.05 (3 per cent maximum) totaling $1,000 for each $1,000 of debt retired. This appeal from the district court decision [5] by the company and by the Commission has been met by cross-appeals filed by some of the debenture holders.

The questions in order of difficulty and importance are as follows:

(1) The power of the Commission to order distribution in kind to note and debenture holders instead of ordering a sale of corporation assets and paying them in cash.

(2) If the Commission has such power was it properly exercised in this case? Is this a matter on which a district court and an appellate court should exercise an independent judgment or is its function to be limited to determining whether the Commission's action was reasonable under the circumstances.

(3) Exercisability of the call premium on the debentures to be cancelled.

(4) Problem of valuation of the shares proposed to be distributed.

Power to Order Distribution in Kind

[1] The primary question is concerned with the power of the Commission to order distribution in kind rather than cash. Both the Commission and the opposing security holders start with the premise that absent statutory authorization the creditor of a solvent corporation must be paid off in cash. The Commission contends that statutory authority for payment in kind exists. The security holders, of course, disagree, and the district court is of the same view.

It is clear from the legislative history of the act that power of reorganization was one of the intended and well-recognized means for effectuating the congressional purpose. On February 6, 1935, a bill was first introduced by Senator Wheeler as S. 1725 in the Senate and by Congressman Rayburn as H. R. 5423, a companion measure in the House. Section 11 of S. 1725 expressly gave the Commission power to order reorganizations, but contained no provision for permitting voluntary plans. A substitute bill, S. 2796, was introduced on May 9, 1935, by the same sponsor. Section 11(e) first appeared in this bill and to meet the standards of § 11(b) expressly permitted a voluntary plan, "for the divestment of control, securities, or other assets or for the reorganization or dissolution of such company, or any

Stocks	No. of Shares	Assigned Value Per Share	Aggregate Assigned Value
Pacific Gas and Electric Co.	3	$32.	$96.
Oklahoma Gas and Electric Co.	12	21.	252.
The California Oregon Power Co.	5	24.	120.
Mountain States Power Co.	2	21.	42.
Wisconsin Public Service Corp.	18	10.	180.
			$690.00
Cash Payment			$304.95
Cash Differential			5.05
		Total	$1000.00

[5] (1945) 58 PUR(NS) 278, 59 F Supp 274.

subsidiary company." In the act as it finally passed this was changed to, "for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company."

Appellants argue that the change narrowed the former language. It needs no semanticist to be aware that the words "other action" are broader in meaning than the more connotative and precisely denotative words "reorganization or dissolution." Nor need we determine the matter on such meager grounds. The Senate Report (S. Rep. No. 621, 74th Cong. 1st Sess. on S. 2796, p. 33 (1935)) stated: "Subsection (e) expressly authorizes a holding company subject to the approval of the Commission and the court to work out a plan of reorganization to make unnecessary the issuance of an involuntary order for its reorganization by the Commission, and the Commission and the court are authorized to approve any plan so worked out voluntarily by a holding company as the Commission and the court might order under their compulsory powers. . . ."

And Mr. Rayburn in reporting out the final bill (79 Cong. Rec., Part. 13, pp. 14164, 14165) makes clear the enlargement of the Commission's available remedies, "This differs from the Senate provision in that the Commission is to take such steps as it finds necessary to insure this result, whereas the Senate provision requires reorganization or dissolution." Furthermore, the argument contra is as applicable to dissolutions as it is to reorganizations. What voluntary plan could squeeze through so narrow an interpretation? And what becomes of the many 11(e) plans that have won court approval hitherto either as dissolutions or reorganizations?

It is equally clear that in the grant of power to reorganize was included the incidental power to distribute in kind. Thus the Senate Report (S. Rep. 621, 74th Cong. 1st Sess. pp. 32, 33) referring to S. 2796 stated: "Existing holding companies will be obliged [(i) to shed inappropriate affiliates, or (ii) to cease being holding companies] or (iii) to distribute their securities and assets equitably among their security holders. Precedents under the Sherman Antitrust Act and under the Hepburn Act demonstrate that the necessary corporate adjustments can be made without forced liquidation or the sacrifice of legitimate investment values. . . ."

And again at pp. 16, 17 of the same report: "As has been explained above, the title does not require the dumping or forced liquidation of securities by the giant holding companies. Such disposition as may be necessary can be accomplished by reorganization which will equitably redistribute securities among existing security holders."

We have still to consider whether the power to distribute in kind applies to note and debenture holders as well as shareholders. The authority of Otis & Co. v. Securities and Exchange Commission (1945) 323 US 624, 89 L ed —, 57 PUR(NS) 65, 65 S Ct 483, is acknowledged by all the parties, as it must be. But they draw a distinction between the technical position of a preferred shareholder and that of a debenture holder in an attempt to show the Otis Case inapplicable to the problem here. We think the argument rides that distinction too

hard and that as applied to the present problem the distinction is one lacking in essential difference. Persons who put money into a corporate enterprise do not, of course, all stand on the same plane in regard to their rights and duties. The bondholder may have a specific lien on the corporate assets. The noteholders have no specific lien but they are entitled to have their money paid back to them before the shareholders divide what is left. Among shareholders, too, there may be distinctions of which preferred and common stock come most ready to the mind but which distinctions increase in number as other types of shares are created. But we do not see that the classifications of these investors in a corporate enterprise necessitates the drawing of lines so completely separated in categories as the security holders would have us draw here. A noteholder, after all, has only a claim to be paid from corporate assets after security holders with specific liens are paid. The preferred shareholder has to wait until the noteholder is paid for his money, but in the meantime he may have a voice in the management of the corporate enterprise. We do not think that the categories are so absolute that a decision saying what preferred shareholders may be forced to take in a reorganization under the Public Utility Holding Company Act is of no value in another case which concerns debenture holders instead of preferred shareholders.

The short answer to this phase of our problem as applied to this case is that the shareholders and debenture holders both come from the same common stock (that is, the shares of the companies in Standard's portfolio) and cannot rise above their heredity. This identity of origin renders caste distinctions of little significance here.[6] Consequently a general grant of power to reorganize which has been held applicable to one group of security holders, as here, by the Otis decision, must be held applicable to the other. If Congress had meant otherwise, the distinction between debenture holder and shareholder could all too easily have been made. The fact that Congress neither drew the line of demarcation nor even discussed it in the hearings or reports indicates how little weight a separatist argument can be given now.

Our conclusion upon this phase of the case is that distribution in kind may lawfully be ordered by the Commission. We think that these proceedings under the statute are a type of reorganization and that the well known and established methods of accomplishing reorganization in a manner fair to all parties may be applied. We find close analogy, though ad-

[6] Hearings before Senate Committee on Interstate Commerce, 76th Cong. 1st Sess. on S. 1725, p. 614 (Senator Burton K. Wheeler, Chairman; Wendell L. Willkie, President of the Commonwealth & Southern Corporation, New York City).

"The Chairman. As a matter of fact, it is not a bond in the sense that people have always understood bonds.

"Mr. Willkie. That is true.

"The Chairman. It is not a bond in the sense that we have always understood it. It is simply a debt based on common stock.

"Mr. Willkie. Exactly, sir; and I say one of two things would be done about it. Any purchaser of that kind of security should have every warning that that is what he is buying, or they should be prohibited. As to prohibiting them, I should think you would want to make a study of all forms of corporate enterprise in this country. I think the wise course is to leave with the Commission the power of determination in that regard."

mittedly, not direct support for our position in the Otis decision, and think that the sweep of that decision extends to the present fact situation. The public purpose of the statute and certain constitutional questions involved in it were discussed by this court in Commonwealth & Southern Corp. v. Securities and Exchange Commission (1943) 48 PUR(NS) 72, 134 F2d 747. What was then said upon these points is reaffirmed here.

Commission Distribution in Kind In This Case

[2, 3] The district judge gave thoughtful consideration to this question and concluded that even if the Commission had power to order distribution in kind to a noteholder, the present was not a proper case for the exercise of the power. The point is not free from difficulty. The language used in the statute with regard to district court review is much like that found in Chap 10 of the Bankruptcy Act, 11 USC § 501 et seq., in which the district court must find the plan fair and equitable.[7] The power and duty of a district court in this respect is now a well-established principal in Federal jurisprudence.

This case does not come to the court as the result of agreement between the parties or the action of a special master approving a plan in the common form of reorganization proceeding. It comes following a thorough consideration by the Securities and Exchange Commission which has a very broad grant of power from Congress in the premises.[8]

It can be set out as a well-established rule of administrative law that the action of an expert administrative body in determining the particular remedial measures demanded in an individual case is not to be overturned by court action unless the administrative body has lost sight of the law.[9] The more technical the subject matter before the administrative tribunal, the more reluctant the court should be, we think, in disagreeing with it on a matter which is a question of

[7] Thus the applicable portion of Chap 10 of the Bankruptcy Act, 11 USCA § 621, reads, "Confirmation by court, The judge shall confirm a plan if satisfied that— . . . (2) the plan is fair and equitable, and feasible; . . . ." The comparable language in § 11(e) of the Public Utility Holding Company Act, 15 USCA § 79k(e), set out in full in footnote 2, reads, " . . . shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of § 11."

[8] Section 1(c) of the act, 15 USCA § 79a (c), provides:

"When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title."

[9] 1 Federal Administrative Law, Vom Baur, 253 § 260 states: "Where statutory provisions give an administrative agency a discretionary option to apply one of two or more sanctions to the party involved, upon the basis of certain findings of fact, the exercise of such discretion is not subject to judicial review. If the sanction selected by the agency is legally appropriate for the facts found, there is no occasion for judicial review. Private persons have no right to a particular selection of optional administrative sanctions, and the matter of choice is entirely one of administrative discretion."

judgment. The subject matter of this act is highly technical. It seems to us that it is unlikely that Congress, in vesting authority to handle reorganizations of great public utility empires under the statute, would give the expert less power than bodies for easier and less complicated pieces of work unquestionably have. In other words, we think the wide grant of power given by Congress to the Commission carries with it the authority to the Commission to fix the form of reorganizations, subject to court control if the Commission departs from the law. We do not think that the district court or appellate court is to substitute its notion of practical expediency for that of the Commission.

In the instant case, the Commission has said that noteholders are to be paid off partly in cash, partly in stocks from the portfolio of Standard. The district judge concluded that the only plan which is fair and equitable to the note holders is to pay them in cash the amount of their notes.

Fair and equitable are not terms to be applied in the abstract; they relate to all the parties concerned, shareholders as well as creditors. They also relate to a plan designed to accomplish a public purpose as declared in the statute which is being enforced. Companies which are solvent and not being subjected to regulation do not have to be troubled about plans except those for promoting their own business. But certain public utility holding companies are liable, under the statute, to have things done to them in reshaping their affairs to comply with the statute. All those owning interests in the particular enterprise are necessarily affected by the action taken. The object of the whole process is, of course, to accomplish the public purpose with all round fairness to those whose interests are affected.

The noteholders may sell the shares proposed to be distributed to them if they please. If they do, they will have to bear the expense of the sale. That is really all their objection comes down to, once it is established that the shares they are being given, plus the cash, amount to the face of their notes. The Commission says that distribution in kind is good sense. It avoids the expenses of underwriting and selling the shares and paying out the money and, more important, avoids turning the holdings in these companies on the market with the danger of lowering the price of the shares by putting on the market more than could be absorbed without depressing selling prices. Which method is to be followed is a matter of judgment, and the Commission has exercised its judgment. We think its exercise was not unreasonable nor inequitable and should be allowed to stand. There is talk about the noteholders being compelled to take "wampum" instead of money for part of their holdings. This is good, argumentum ad hominem, but it is not good enough. The stuff these noteholders are being given is the very stuff which makes the corporate promise to pay worth anything. They are getting the cream off the milk in the Standard icebox. Nor does this distribution in kind turn them from investors to speculators. All they ever had was the corporation's promise. This promise was backed by what the corporation owned and what the corporation owned was junior equities in a number

of public enterprises. Owning the junior equities is no more speculative than the promise of the corporation whose assets consist of such equities.

Exercisability of Call Premium

[4] All the debenture holders appearing before us insist that if the debentures are to be liquidated the holders are entitled to the call premiums specified in the contract between the company and the holders thereof.[10] Neither the Commission nor the district court agreed with this view and we do not either. There is good authority supporting the position that retirement of the obligation under these circumstances is not the kind of voluntary calling by the company which brings the terms into operation. New York Trust Co. v. Securities and Exchange Commission (1942) 46 PUR(NS) 270, 131 F2d 274, certiorari denied (1943) 318 US 786, 87 L ed 1153, 63 S Ct 981, rehearing denied 319 US 781, 87 L ed 1725, 63 S Ct 1155; City National Bank & Trust Co. v. Securities and Exchange Commission (1943) 48 PUR(NS) 195, 134 F2d 65; in Re Laclede Gas Light Co. (1944) 58 PUR(NS) 414, 57 F Supp 997; in Re Consolidated Electric & Gas Co. (1944) 56 PUR(NS) 417, 55 F Supp 211.

The debenture holders obliquely attack the holdings of these decisions and say in addition that they present a different problem from the one in this case. We think the decisions are right and that the reasons they give are applicable.

Problem of Valuation

Only one appellant attacks the valuations arrived at as a basis for the stock distribution. This was noteholder Albert J. Fleischmann participating in the appeal on his own behalf. The Commission went thoroughly into the questions of valuation and received a large amount of testimony upon the subject. Its conclusions were subjected to examination by the district court and an express finding of fact was made upholding the values set by the Commission.[11]

The subject is one upon which it is especially difficult to demonstrate with any mathematical precision the correctness of the answer reached. Few things have a value which can be expressed in absolute terms if indeed any do. It can nearly always be argued that certain considerations or figures should be given more weight, and others less, than the evaluating body gave them. Yet, to finish up a practical piece of business, a value has to be set and someone must have the eventual responsibility of determining what the figure is to be. We have been over the arguments attacking the figures. While the points are admittedly subject to discussion, we find no basis on which we as an appellate court could overthrow the conclusions reached both by the Commission and the district court.[12]

[10] The language in the debenture is that "at the option of the company this debenture may be redeemed" etc.

[11] Findings of Fact 11: "$695.05 constitutes a fair value for the Stocks proposed to be delivered to the Noteholders [i. e. note and debenture holders] under the Plan but the values of such stocks are not static and the Stocks, by reason of variation in market value, may be worth much less or much more than $695.05 when received by the Noteholder as contemplated by the Plan."

[12] Actually it was not incumbent upon the Commission to reduce the result to dollars

The judgment of the district court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

and cents in the process of valuation. All that is required is a "comparison" of the new securities with the old "to determine whether the new are the equitable equivalent of the old." Group of Institutional Investors v. Chicago, M. St. P. & P. R. Co. (1943) 318 US 523, 87 L ed 959, 63 S Ct 727, 749. Two factors that bulk largest in determining the "equitable equivalent" of what was at least nominally a debenture, though founded on common stocks, are safety and interest rate. As pointed out in footnote 4 the safety factor was increased. The interest rate was increased from a rate of 6 per cent to a projected earnings rate of 10 per cent.

ARIZONA SUPREME COURT

Amos A. Betts et al.

v.

Jerome Bernard Roberts

No. 4751
— Ariz —, 162 P2d 423
October 8, 1945

APPEAL *from judgment for plaintiff in action to set aside Commission order authorizing competing motor carrier service; affirmed.*

Monopoly and competition, § 61 — Motor carrier competition — Opportunity to improve existing service.

The Commission may not authorize motor carrier service in an area served by an existing motor carrier without first giving the existing carrier an opportunity, after request, to provide satisfactory service.

APPEARANCES: Joe Conway, Attorney General, Thomas J. Croaff, Assistant Attorney General (Phil Jacobson, of Los Angeles, Cal., of counsel), for appellants; Jennings, Salmon & Trask, of Phoenix, for appellee.

STANFORD, CJ.: On May 29, 1942, appellants received from the Western Truck Lines, Ltd., a corporation, its application for an order of the Arizona Corporation Commission for a certificate of public convenience and necessity authorizing the transportation of freight and express between Parker, Arizona, and Ehrenberg, Arizona, passing through and serving all intermediate points, including the Japanese Relocation Center of Poston. For a long time prior thereto the Western Truck Lines, Ltd., was the holder of certificates of convenience and necessity issued by the Arizona Corporation Commission for transportation as a common carrier of property, freight,

and express between Phoenix and Ehrenberg, Arizona, and between Phoenix and Parker, Arizona.

The application of the Western Truck Lines, Ltd., was protested by the appellee herein. In July, 1942, the certificate as prayed for by said Western Truck Lines, Ltd., was granted.

Some 18 miles south of Parker, Arizona, there had been established, before the application of the Western Truck Lines, Ltd., a certain relocation camp for Japanese persons, the place being known as "Poston." Prior to the time of the Western Truck Lines., Ltd., being issued its certificate of convenience and necessity, the appellee herein had served the town of Parker and vicinity for 25 miles thereabouts, including the town of Poston, by reason of a certificate of convenience and necessity issued to him by the appellants.

In addition to intrastate commerce by the Western Truck Lines, Ltd., it also conducted a business through parts of the state of Arizona by authority of the Interstate Commerce Commission, operating between points in the state of California and points in the state of Arizona.

In August, 1942, appellee filed his complaint in the superior court of Maricopa county, Arizona, complaining, mainly, that the Arizona Corporation Commission had not, before the issuance of its certificate to the Western Truck Lines, Ltd., to operate, determined by its order, or otherwise required appellee to extend or improve the services rendered by him in such manner as to meet any public convenience and necessity found and determined by said Arizona Corporation Commission to exist, or to provide such services as said Commission might deem necessary. The complaint of appellee asked that said superior court make and enter an order adjudging said order of the Commission void and illegal and that the certificate of convenience and necessity issued was contrary to law.

From a judgment of the superior court granting the relief prayed for by plaintiff therein, this appeal is taken.

One of the principal contentions of the appellant is:

"It was not possible, practicable, or convenient, to haul this large amount of freight by motor carriers from Phoenix, a large part under refrigeration, and to dump the same on the local transfer service at Parker, operated by appellee; and to have the same merchandise reloaded, recooled by other refrigeration service (none being available at Parker) and hauled by transfer or vicinity service to the camps at Poston."

It is further contended by the appellant:

". . . that the plaintiff-appellee in this action could not render the necessary service, having no rights to operate *between* Phoenix and other points and places within the 25 miles of Parker, Arizona, to which his certificate is limited. He contends that commodities should have been delivered to him at Parker for ultimate redelivery to points within a radius of 25 miles, notwithstanding the fact that *plaintiff-appellee offered no scheduled service, did not have adequate equipment to handle large consignments, and had minimum rates which would prohibit the movement of shipments*

in small loads, by unloading and reloading at Parker."

Section 66–506, A.C.A.1939, under the heading of "Common motor carrier certificates—Application therefor" in part, reads as follows:

". . . provided, that when an applicant requests a certificate to operate over a route, or routes, or in a territory already served by a common motor carrier, the Commission shall have power, after hearing, to issue such certificate only when the existing common motor carrier operating over such route, or routes, or serving such territory, will not provide such service as shall be deemed satisfactory by the Commission."

In the instant case no request was made by the Corporation Commission to the appellee to improve his service.

The soundness of this statute is upheld in the case of Corporation Commission v. Hopkins (1938) 52 Ariz 174, 25 PUR(NS) 516, 517, 519, 79 P2d 946. We quote:

"This is an appeal by the Corporation Commission, hereinafter referred to as the Commission, from a judgment of the superior court of Maricopa county vacating and setting aside a certificate of convenience and necessity issued by such Commission on March 31, 1937, to P. J. Gragnon, Jr., as a common carrier by motor vehicle of farm products in the city of Yuma and vicinity with a radial area of 25 miles.

"The appellees were at the time holders of certificates of convenience and necessity and operated as common carriers of farm products in the same territory. They appeared by an agent at the hearing of Gragnon's application for a certificate and protested against his being granted a certificate on the grounds that he had not shown 'that the operators in that territory are not giving satisfactory service and . . . that his services are necessary.' The Commission ordered the issuance of a certificate of convenience and necessity to Gragnon at the hearing.

. . . . .

"We think upon the hearing that if it appeared to the Commission that the service appellees were rendering in the city of Yuma and vicinity was unsatisfactory to the Commission, it should have designated wherein it was insufficient or inadequate and given the appellees an opportunity to provide satisfactory service, or an opportunity to refuse to do so, before it had power to issue a certificate to Gragnon."

Bearing on the same subject, or construction to be placed on § 66–506, *supra,* in the case of Corporation Commission v. Pacific Greyhound Lines (1939) 54 Ariz 159, 32 PUR (NS) 503, 516, 94 P2d 443, 451, the court said:

". . . The proper procedure to be followed by the Commission, under the circumstances set forth in the record, was as follows: It should first have examined the new service offered by the applicant and determined whether it is more in the interest of the traveling public than that furnished by the plaintiff. If its answer is in the affirmative, it should then offer to the plaintiff an opportunity to furnish such new service, and if plaintiff can, and will, do so, should deny the application. . . ."

The Japanese Relocation Camp at Poston is reached by trucks entering it by going to Parker, Arizona, on the pavement and then going south to

Poston and after the delivery of goods returning to Parker.

In view of the fact that this appellee was never requested by the Corporation Commission to provide satisfactory service to handle freight and express, we hold from the foregoing authorities that the Commission was without authority to issue the certificate to Western Truck Lines, Ltd.

The judgment is affirmed.

La Prade and Morgan, JJ., concur.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Northwestern Mining & Exchange Company of Erie, Pennsylvania

v.

West Penn Power Company

Complaint Docket No. 14110
November 26, 1945

COMPLAINT *against refusal of electric company to furnish service; petition by another electric company for leave to intervene dismissed.*

Monopoly and competition, § 32 — Service in charter territory — Further transmission by customer.

1. An electric utility may deliver electric energy at a point in its charter territory for transmission by the patron for use outside that charter territory, where the transmission from the point of delivery to the point of use is carried out over the patron's privately owned line, p. 186.

Service, § 487 — Parties — Intervention — Competitors.

2. An electric utility company has no material interest entitling it to intervention in a proceeding on complaint against the refusal of another company to furnish service to a patron within its charter territory for transmission by the patron over his own lines to a point in the charter territory of the first company, p. 186.

(HOUCK, Commissioner, dissents.)

By the COMMISSION:

[1, 2] The gravamen of the instant complaint is that West Penn Power Company has refused to furnish Northwestern Mining & Exchange Company of Erie, Pennsylvania, with electric power at complainant's Central Power Plant located in the village of Hellen Mills, Horton township, Elk county, Pennsylvania. Respondent is willing to serve the two mines of complainant located within

respondent's charter territory, but refuses to serve complainant's Kramer Mine which is within the charter territory of Pennsylvania Electric Company. Complainant, as stated, proposes to take service at its Central Power Plant, within the charter territory of respondent, and to transmit the energy to its Kramer Mine over its privately owned transmission lines and rights of way.

Pennsylvania Electric Company has petitioned to intervene on the ground that it has charter power to supply electricity in Henderson township, Jefferson county, Pennsylvania, in which township complainant's Kramer Mine is located, and that respondent has no charter powers in said Henderson township.

It is well-settled law that an electric utility may deliver electric energy at a point in its charter territory for transmission by the patron for use outside that charter territory where the transmission from the point of delivery to the point of use is carried out over the patron's privately owned line. Kulp v. Public Service Commission (1923) 82 Pa Super Ct 83, 88; Stockertown Light Heat & P. Co. v. Pennsylvania Edison Co. 7 Pa PSC 377, PUR1926B 201; Schuylkill Haven v. Pennsylvania Power & Light Co. (1934) 12 Pa PSC 567, 569, 3 PUR (NS) 127. Pennsylvania Electric Company therefore has no material interest under the undisputed facts, and its petition to intervene must be dismissed; therefore,

It is *ordered:* That the petition of Pennsylvania Electric Company for leave to intervene in the instant proceeding be and is hereby dismissed.

Commissioner Houck voted in the negative.

UNITED STATES SUPREME COURT

United States of America et al.

v.

Detroit & Cleveland Navigation Company et al

No. 22
— US —, 89 L ed —, 66 S Ct 75
November 5, 1945

APPEAL *from decree setting aside order of Interstate Commerce Commission authorizing common carrier transportation of motor vehicles by water; reversed. For lower court case, see (1944) 57 F Supp 81.*

Monopoly and competition, § 41 — Water carrier competition — Adequacy of pre-war service.

1. The inadequacy of water transportation of motor vehicles prior to the war is relevant to a determination of the need for proposed water transportation of motor vehicles to be instituted upon a resumption of the production of automobiles after the war, p. 189.

Monopoly and competition, § 97 — Discretionary power of Commission — Water carrier competition.

2. The Interstate Commerce Commission acted within its discretionary power to permit the proposed common carrier transportation of motor vehicles by water if it "is or will be required by the present or future public convenience or necessity," where it based such authorization upon the inadequacy of earlier service which had been discontinued during the war, the likely requirements for the future, and the inability of the existing carrier to effect an expeditious resumption of service at the war's end, p. 189.

APPEARANCES: Charles H. Weston, of Washington, D. C., argued the cause for appellants, the United States and Interstate Commerce Commission; Sparkman D. Foster, of Detroit, Michigan, argued the cause for appellants, T. J. McCarthy S. S. Co., et al.; Ernest S. Ballard, of Chicago, Illinois, and S. S. Eisen, of New York city, argued the cause for appellees.

Mr. Justice DOUGLAS delivered the opinion of the court: The Interstate Commerce Commission pursuant to § 309 (c) of Part III of the Interstate Commerce Act ([September 18, 1940] 54 Stat 898, 942, chap. 722, 49 USCA § 909 (c), 10A FCA title 49, § 909 (c)) granted to T. J. McCarthy Steamship Co. and Automotive Trades Steamship Co. (whom we will call the applicants) a certificate of convience and necessity to operate as common carriers in the transportation by water of motor vehicles from Detroit, Michigan to ports on Lake Erie and Lake Superior.[1] 260 Inters Com Rep 175. The appellees, who were protestants in the proceeding before the Commission and who are common carriers of motor vehicles by vessels on the Great Lakes, challenged that order before a district court of three judges. That court set aside the Commission's order. (1944) 57 F Supp 81. The case is here on appeal.[2]

World War II caused the cessation of the production of motor vehicles for civilian use. Prior to that time appellees as common carriers had transported motor vehicles by vessels from Detroit to various ports on the Great Lakes. The applicants owned three vessels equipped as automobile carriers. These vessels were used extensively prior to the war in transporting automobiles from Detriot to Lake Erie ports. They were for the most part under charter to one of the appellees from 1936 through 1941.. With the advent of the war the United States requisitioned many of the ves-

[1] The companies are both controlled by T. J. McCarthy. The certificate runs to T. J. McCarthy Steamship Co., for itself and as managing agent of Automotive Trades Steamship Co.

[2] Section 210 (28 USCA § 47a, 7 FCA title 28, § 47a) and § 238 of the Judicial Code as amended, 28 USCA § 345, 8 FCA title 28, § 345.

sels of the appellees, using some of them for carrying bulk commodities on the Great Lakes and removing others to the salt water. As a result, two of the appellees at the time of the hearing [3] in June, 1943, had no automobile carriers and were not operating; the third was operating nine vessels of which five were owned by and operated for the United States. In contrast, the applicants owned their three vessels free and clear of any encumbrance; and while those vessels had been converted for carrying bulk traffic, all of the equipment necessary for reconversion into automobile carriers had been preserved. The Commission found that prior to the war there were insufficient facilities for the movement of automobiles on the Great Lakes during certain peak periods even with the carrying capacity of applicant's vessels included. There was testimony of automobile manufacturers and of motor common carriers that the carrying capacity of applicants' vessels would be needed when the manufacture of automobiles was resumed. The Commission found that prior to the war there was a definite need for the carrying capacity of applicants' vessels in this transportation and that there was a reasonable certainty that a like need for that capacity would arise when the production of automobiles for civilian use was resumed. It found that while the applicants could readily reconvert their vessels to handle automobile traffic, there was considerable uncertainty as to the length of time it would take the appellees to procure and place in operation the additional vessels which would be needed when production of automobiles for civilian use was resumed. It concluded that the public interest would be adversely affected if, after production was resumed, appellees were delayed in acquiring the additional facilities needed to meet the transportation demands. On that basis it held that the proposed service would be required by future public convenience and necessity.

The district court held that the Commission's order could not be sustained in absence of evidence that applicants' vessels were the only vessels available to appellees to meet the prospective transportation demands beyond that furnished by their own vessels. It concluded that not only was there no finding that if applicants' vessels were not chartered there was no other carrying capacity which could have been acquired but that the record established the contrary.

[1, 2] The case, however, is not one where there is a service presently being rendered and a newcomer seeks entry into the field. Whether in that event the ruling of the district court would be correct is a question we do not reach. While the authority of appellees to serve as carriers has not been terminated, the service formerly rendered by them has been interrupted by the war. The applications concern a proposed additional service to be rendered in the future. Section 309(c) authorizes the Commission to permit the proposed service to be rendered if it "is or will be required by the present or future public convenience and necessity." That entails a prophecy so far as future requirements are concerned. The Commission made that prophecy on the basis of (1) the earlier service

[3] The Commission rendered its decision on March 7, 1944.

which had been discontinued during the war, (2) the likely requirements for the future, and (3) the ability of the existing carriers to effect an expeditious resumption of service at the war's end. The ability of the applicants promptly to render the service at that time is adequately established. Whether the appellees could or would move with like dispatch is less certain. Many of the vessels which they previously owned had been taken by the United States. And the Commission had doubt as to whether they would or could obtain the necessary additional transportation facilities in time to meet the foreseeable future demands which would arise when automobile manufacture was resumed. We do not have here a case where there was a surplus of facilities in the prior service which the war interrupted. The Commission indeed found that the prior service had not been adequate, a finding which we think is supported by evidence. It took that fact into consideration in determining the margin of safety which the public interest required for the resumption of the interrupted service. We think the inadequacy of the prior service was relevant to that determination. It not only bore upon the future shipping needs which were likely but also underscored the danger of delays in resuming the service if the field were left exclusively to existing carriers.

If the Commission were required to deny these applications unless it found an actual inability on the part of existing carriers to acquire the facilities necessary for future transportation needs, a limitation would be imposed on the power of the Commission which is not found in the act. The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. Interstate Commerce Commission v. Parker (1945) 325 US —, 89 L ed —, 59 PUR(NS) 199, 65 S Ct 1490. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. See Chesapeake & O. R. Co. v. United States, (1931) 283 US 35, 42, 75 L ed 824, 829, 51 S Ct 337; Alton R. Co. v. United States, (1942) 315 US 15, 23, 86 L ed 586, 595, 62 S Ct 432. Forecasts as to the future are necessary to the decision. But neither uncertainties as to the future nor the inability or failure of existing carriers to show the sufficiency of their plans to meet future traffic demands need paralyze the Commission into inaction. It may be that the public interest requires that future shipping needs be assured rather than left uncertain. The Commission has the discretion so to decide. It went no further here.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

MISSOURI PUBLIC SERVICE COMMISSION

Re North Kansas City Bridge & Terminal Railroad Company

Case No. 10559
October 8, 1945

APPLICATION *for certificate of public convenience and necessity for construction, acquisition, and operation of a terminal or switching railroad; jurisdictional question decided and motion to strike part of answer overruled.*

Certificates of convenience and necessity, § 16 — Jurisdiction of Commission — Construction of railroad.

1. The state Commission has jurisdiction to grant a certificate of public convenience and necessity for the construction and operation of a purely intrastate railroad, notwithstanding the fact that a certificate from the Interstate Commerce Commission would be necessary before the railroad could commence to handle interstate shipments, p. 192.

Pleading, § 9 — Answer — Statement of legal proposition.

2. A motion, in a proceeding to obtain a certificate of convenience and necessity for the construction of an intrastate railroad, to strike from the answer of a protestant a statement of an abstract proposition of law as to the exclusive jurisdiction of the Interstate Commerce Commission over an application for a certificate to construct or operate a railroad in interstate commerce, should be denied as not prejudicing the rights of the applicant and conceivably being necessary in order that protestants may make some point upon which they wish to rely, p. 192.

Procedure, § 3 — Commission proceeding — Technical rules.

3. Technical rules of pleading and evidence are not followed by the Commission, p. 192.

By the COMMISSION: The applicant, North Kansas City Bridge and Terminal Railroad Company, seeks a certificate of public convenience and necessity for the construction, aquisition, and operation of a terminal or switching railroad, all of which will operate within the boundaries of the state of Missouri in the counties of Clay and Jackson.

The Chicago, Burlington & Quincy Railroad Company filed a protest and answer to the application and Wabash Railroad Company likewise filed a protest and answer. Thereafter applicant filed separate motions to strike from the answer of each of the above railroad companies the following language which is identical in each protest and answer: "That the Interstate Commerce Commission has exclusive jurisdiction of an application for a certificate of convenience and necessity for the construction or operation of a railroad in interstate commerce."

The motion to strike asserts that

the purpose of the motion was to bring before this Commission the question of whether or not it has jurisdiction to grant a certificate of public convenience and necessity to applicant or is that jurisdiction vested exclusively in the Interstate Commerce Commission.

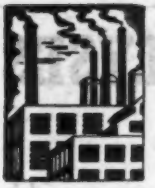
[1–3] This question of jurisdiction was argued orally before the commission en banc on June 14, 1945, following which both applicant and the protestants have filed briefs. The purpose of presenting this one question to the Commission was to eliminate the necessity of a long and involved hearing upon the merits of the application and the protests if this Commission should conclude that the Interstate Commerce Commission has exclusive jurisdiction and that, therefore, this Commission has no jurisdiction.

We have carefully considered the oral arguments and the briefs presented and have made independent research upon the question presented and after full consideration, it is our opinion that this Commission does have jurisdiction to grant a certificate of public convenience and necessity for the construction and operation of a purely intrastate railroad and that such a certificate must be obtained from this Commission before the construction of such a railroad may be lawfully commenced; that such a railroad may be constructed and commence operating under a certificate issued by this Commission, but before such a railroad could commence to handle interstate shipments, it must also obtain a certificate of public convenience and necessity from the Interstate Commerce Commission. This being our opinion, the application will be set for hearing upon the merits at some future date convenient to the parties. We will not sustain the motions to strike for the reason that the above-quoted language which the motions seek to strike appears to be a correct statement of an abstract proposition of law and being nothing more than that, we fail to see where it could in any manner prejudice the rights of the applicant in a hearing upon the merits. Furthermore, that portion of the answers could conceivably be necessary in order that protestants may make some point upon which they wish to rely. Technical rules of pleading and evidence are not followed by this Commission and hence the motions to strike will be overruled.

It is, therefore,

Ordered: 1. That the motions of North Kansas City Bridge and Terminal Railroad Company to strike a portion of the respective protests and answers of Chicago, Burlington & Quincy Railroad Company and Wabash Railroad Company be and the same are hereby overruled and that this cause be set for hearing in regular course upon the merits of the application and the protests and answers filed.

Ordered: 2. That this order shall take effect ten days after the date hereof, and that the secretary of the Commission shall forthwith serve a copy hereof upon all interested parties, and that said parties shall notify the Commission before the effective date of this order in the manner prescribed in § 5601 Rev Stats Mo 1939, whether the terms of this Order are accepted and will be obeyed.



Industrial Progress

Selected information about products, supplies, and services offered by manufacturers. Also announcements of new literature and changes in personnel.

Marmon-Herrington Offers New Delivery Vehicle

MARMON-HERRINGTON, builder of All-Wheel-Drive trucks, offers a new house-to-house delivery vehicle of outstanding design, the DeliVr-All—which brings to the commercial world a vehicle embodying convenience and performance features essential to satisfactory house-to-house and store-to-store delivery. Features incorporated in the new DeliVr-All include:

1. Low, close-to-the-ground floor throughout, for easy step up and step down—for easy loading and unloading.
2. Unobstructed floor, from stem to stern, for greater load space.
3. Stand-up head room, without excessive over-all height.
4. Controls arranged for either sit-down or stand-up operation.
5. Front wheel drive, with completely detachable power and control unit for mechanical accessibility and interchangeability.
6. Wide doors (both sides and rear) for easy entrance and exit.
7. Unobstructed clear vision, for maximum safety.
8. Exceptionally short wheelbase, for easy maneuvering in and through traffic.
9. Flexible, compact, economical engine.
10. Streamlined styling, for customer appeal.

Orders for DeliVr-All are now being accepted. Further information may be obtained from Marmon-Herrington, Indianapolis 7, Indiana.

Book Describes P&H Grab Bucket Cranes

A NEW 28-page book, describing P&H grab bucket cranes which are built for service on all types of jobs, whether large or small, has been issued by the Harnischfeger Corporation. Construction details are given and various industrial applications are illustrated.

Particularly suited for handling solid fuels and all types of bulk materials, these cranes are claimed to be widely used in power plants.

A copy of the book may be obtained from the Harnischfeger Corporation, Milwaukee 14, Wisconsin. Ask for bulletin C9-1.

New Dry Type Transformer Offered Utilities by A-C

DEVELOPED during the war for marine use, a new dry type transformer up to one-third lighter and one-third smaller is now offered by the Allis-Chalmers Manufacturing Company through industries and utilities for correction of voltage conditions, distribution of power in new and expanded plants, and establishment of adequate secondary distribution.

Employing class B insulating materials, these new 80 C rise dry type transformers weigh 22 to 38 per cent less than the old 55 C rise transformers and use smaller conductors for smaller over-all size.

Compactness and light weight permit placing these units on posts, walls, overhead, and on machines in a wide range of applications, according to the manufacturer. Fireproof vaults are unnecessary for inside building applications since no insulating liquids nor combustible materials are used.

Complete details are given in bulletin 6382, available on request from the Allis-Chalmers Manufacturing Company, 606, Milwaukee 1, Wisconsin.

Pacific Coast Plant Founded By International Harvester

INTERNATIONAL HARVESTER COMPANY has announced the establishment of its first Pacific coast motor truck manufacturing plant at Emeryville, California, in the San Francisco Bay area.

Peter V. Moulder, vice president in charge of the company's motor truck division, who made the announcement, said the Emeryville works would produce six models of heavy-duty International trucks, especially designed for the highway and off-the-highway needs of truck operators in the eleven western states.

H. B. Matheny New Manager R-R Public Utility Department

T. J. NORTON, sales manager, systems division, Remington Rand, announces the appointment of H. B. "Mac" Matheny as manager of public utility department. Mr. Matheny brings to his new assignment eighteen years' experience in working with public utility executives in developing systems and procedures for effective administrative control.

Mr. Matheny will coördinate the efforts of

(Continued on page 28)

(*Continued from page 26*)

systems technicians throughout the nation in the development of public utility administrative controls, featuring customer history, centralized service, property records, and other major applications. He will be assisted by four regional specialists: G. E. Wittekind who headquarters in Chicago to cover the central west; F. R. Overstreet who serves the Ohio and lower Mississippi valleys; C. H. Cowart in the south and southeast; and H. H. Wallace who works with utilities in New England and the middle atlantic states.

James F. Foley, former manager of the public utility department, becomes manager of the methods research department where he is now broadening his activities by directing research to develop better techniques for record administration in all lines of business.

Fiberglas Urges Home Appliance Buyers to Consider Real Needs

BELIEVING that users, manufacturers, dealers, and public utilities supplying gas and electricity all benefit when buyers of home appliances fit their purchases to their needs, Owens-Corning Fiberglas Corporation, manufacturer of thermal insulating materials, is sponsoring a consumer advertising campaign urging prospective purchasers of refrigerators, ranges, water heaters, and other home appliances to make sure the appliances they buy are large enough to meet their real requirements.

The campaign is planned to facilitate tie-ins with campaigns sponsored by manufacturers of home appliances and by public utilities. Manufacturers and their dealers will be supplied with copies of "Some Things to Remember," without charge, for customer distribution. Collateral materials such as tie-in material for newspaper, radio and direct mail advertising, display cards, and window streamers will also be provided without cost. Public utilities will be supplied with similar collateral material, and with copies of "Some Things to Remember" for distribution at cooking schools and special exhibits, and for other use in connection with home service programs.

Comic Book Tells Story of Electricity

A 20-PAGE, full-color comic book explaining how electricity is generated and distributed has been released for the use of electric light and power companies by the Allis-Chalmers Manufacturing Co., Milwaukee, Wisconsin.

Entitled "Jim's Adventure," the comic book uses everyday experiences to tell the complex story of electricity. The narrative is about an educational trip taken by a small boy and his uncle. They visit a steam generating plant, follow the electric power lines from the station back to the boy's home, and in the end, the uncle explains to the boy how electricity is metered.

Allis-Chalmers is making "Jim's Adventure" available to any supplier of electric power and light who requests its, charging a slight fee to help defray the cost of printing. Distribution to schools and consumer groups will be through the local electric light and power companies.

Combustion Engineering Co. Names New Representative

COMBUSTION ENGINEERING COMPANY, INC., 200 Madison avenue, New York, announces the appointment of the Constructor Company 786 Eustis street, St. Paul, Minnesota, as sales agent for the states of Minnesota, North Dakota, South Dakota, and bordering territory in Wisconsin and Iowa.

The Constructor Company has operated throughout this area for many years past as contracting and construction engineers and has done considerable work in the power plant field.

Stacey Brothers Appoints Eastern Representative

APPOINTMENT of William E. Mikolasy as eastern sales representative of the Stacey Brothers Gas Construction Company, Cincinnati, Ohio, has recently been announced by A. E. Harvey, vice president.

Other appointments include Walter E. Flagg of the firm Flagg, Brackett & Durgin, as sales representative in the New England states with headquarters in the Park Square building, Boston, Massachusetts.

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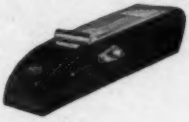

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